# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1962

## No. 463

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, ETC., PETITIONER,

*vs.*

UNITED STATES LINES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1962
CERTIORARI GRANTED DECEMBER 10, 1962

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[fol. A]

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

Docket No. 26716

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ANDRES SAN MARTIN, Plaintiff-Appellant,

*against*

UNITED STATES LINES COMPANY,
Defendant-Appellee and Third Party Plaintiff,

*against*

UNITED STATES OF AMERICA, Third Party Defendant.

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## Plaintiff-Appellant's Appendix

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[fol. 1]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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ANDRES SAN MARTIN, Plaintiff,

*against*

UNITED STATES LINES COMPANY, Defendant.

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STATEMENT UNDER RULE 15(b)

Suit was commenced by filing of Summons and Complaint on June 23, 1955. Issue was joined by service of Answer on March 1, 1956.

Third-Party Complaint was filed on December 31, 1957. Third-Party Answer was filed on October 30, 1958.

Trial with a jury, before Hon. Richard H. Levet, U. S. D. J., was held on May 12, 13, 16, 17, 18, 19 and 20, 1960.

Third-Party action was discontinued on May 19, 1960.

Verdict on the jury issues was entered for the defendant on May 20, 1960.

Hearing on the issues reserved to the Court alone were held before Hon. Richard H. Levet, U. S. D. J., without a jury, on June 14, 20, 22, and 23, 1960.

Final Judgment for the plaintiff in the amount of $224, plus interest, was filed on September 6, 1960.

Notice of Appeal was filed by the plaintiff on September 30, 1960.

[fol. 2]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT—Filed June 23, 1955

Plaintiff Demands a Jury Trial

*To the Honorable Judges of the United States District Court for the Southern District of New York:*

Complaint by Seamen Under Special Rules for Seamen to Sue, Without Costs of Prepayment of Fees.

For a First Cause of Action

First: Upon information and belief that at all times hereinafter mentioned, the defendant was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York.

Second: Upon information and belief that at all times hereinafter mentioned, the defendant was and still is a foreign corporation duly licensed to do business within the State of New York.

Third: Upon information and belief that at all times hereinafter mentioned, the defendant had an office for the [fol. 3] transaction of business in the Borough of Manhattan, City and State of New York.

Fourth: Upon information and belief that at all times hereinafter mentioned, the defendant owned or leased a vessel known as the SS "American Reporter".

Fifth: Upon information and belief that at all times hereinafter mentioned, the defendant operated the said vessel.

Sixth: Upon information and belief that at all times hereinafter mentioned, the defendant was in possession and control of the said vessel.

Seventh: That at all times hereinafter mentioned, the plaintiff was employed on the said vessel by the defendant as a wiper.

Eighth: That at all times hereinafter mentioned, the plaintiff became a member of the crew of the said vessel.

Ninth: Plaintiff elects to maintain this action under the provisions of Section 33 of the Merchant Seamens Act as of June 5, 1920 C. 250 41 Stat. 1007 otherwise known as the Jones Act.

Tenth: That by reason of the unseaworthiness of the said vessel and the negligence of the defendant, its agents, servants and employees on or about the 6th day of November, 1954 while plaintiff was assigned to carry barrels of cement on the gangway of the said vessel, he was caused to twist and strain his back and he thereby sustained severe and painful personal injuries.

Eleventh: Upon information and belief that the said injuries were directly caused by the negligence of the de- [fol. 4] fendant, its agent, servants and employees, in failing to furnish a seaworthy vessel and appliances; sufficient and competent co-employees and superior officers; proper tools and equipment and to keep same in repair; a safe place in which to work; in failing to promulgate and enforce proper and safe rules of seamanship and supervision of said work; and in failing to warn plaintiff of impending dangers and perils.

Twelfth: That by reason of the unseaworthiness of the said vessel and the negligent failure of the defendant, its agents, servants and employees as aforesaid, the plaintiff has been caused to sustain severe and painful injuries; has and will require hospital and medical care; has been and will be disabled and confined to his home and hospital for a long period of time; has lost and will lose large sums of money which he otherwise would have earned.

Thirteenth: The defendant, its agents, servants and employees were further negligent, careless and reckless in failing to provide the plaintiff with timely, adequate, proper

and competent medical care and attention and maintenance and cure, thereby aggravating his condition.

Fourteenth: Upon information and belief that said injuries were not caused or contributed to by any fault or want of care on the part of the plaintiff.

Wherefore plaintiff demands judgment against the defendant in the sum of $75,000.00 together with the costs and disbursements of this action.

For a Second Cause of Action

Fifteenth: Repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

[fol. 5] Sixteenth: Upon plaintiff's becoming ill and injured as aforesaid, it became the duty of the defendant to furnish plaintiff with prompt medical care, attention and medicines, the expense of his maintenance and cure, his earned wages and wages to the end of the voyage.

Seventeenth: That said defendant has neglected and failed to pay him the expense of his maintenance while incapacitated, all his maintenance and cure, his earned wages and wages to the end of the voyage.

Wherefore plaintiff demands judgment against the defendant in the sum of $10,000.00 together with the costs and disbursements of this action.

Benjamin Glickman, Attorney for Plaintiff, Office & P. O. Address, 305 Broadway, Borough of Manhattan, City of New York.

[fol. 6]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 101-310

[Title omitted]

ANSWER

The defendant United States Lines Company answering the complaint by its attorneys, Kirlin, Campbell & Keating alleges upon information and belief as follows:

As to the First Cause of Action

First: It admits that at the times mentioned in the complaint, the defendant was and still is a corporation. It denies each and every other allegation contained in paragraph numbered First of the complaint.

Second: It admits that at the times mentioned in the complaint the defendant was and still is a foreign corporation. It denies each and every other allegation contained in paragraph numbered Second of the complaint.

Third: It admits that at the times mentioned in the complaint the defendant had an office in the Borough of Manhattan, City and State of New York. It denies each [fol. 7] and every other allegation contained in paragraph numbered Third of the complaint.

Fourth: It admits that at the times mentioned in the complaint the defendant owned a vessel known as the S.S. "American Reporter". It denies each and every other allegation contained in paragraph numbered Fourth of the complaint.

Fifth: It admits the allegations contained in paragraph numbered Fifth of the complaint.

Sixth: It admits the allegations contained in paragraph numbered Sixth of the complaint.

Seventh: It admits that at the times mentioned in the complaint one Andres San Martin was employed as a wiper aboard the S.S. "American Reporter". It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the plaintiff was at any time its seaman employee within the meaning of the Act of Congress of June 5, 1920, Section 33 and within the meaning of the Act of Congress of April 22, 1908, Chapter 149. It denies each and every other allegation contained in paragraph numbered Seventh of the complaint.

Eighth: It admits that at the times mentioned in the complaint one Andres San Martin was employed aboard the S.S. "American Reporter" as a member of the crew. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the plaintiff was at any time its seaman employee within the meaning of the Act of Congress of June 5, 1920, Section 33 and within the meaning of the Act of Congress of April 22, 1908, Chapter 149. It denies each and every other allegation contained in paragraph numbered Eighth of the complaint.

[fol. 8] Ninth: It denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph numbered Ninth of the complaint.

Tenth: It denies each and every allegation contained in paragraph numbered Tenth of the complaint.

Eleventh: It denies each and every allegation contained in paragraph numbered Eleventh of the complaint.

Twelfth: It denies each and every allegation contained in paragraph numbered Twelfth of the complaint.

Thirteenth: It denies each and every allegation contained in paragraph numbered Thirteenth of the complaint.

Fourteenth: It denies each and every allegation contained in paragraph numbered Fourteenth of the complaint.

As to the Second Cause of Action

Fifteenth: Defendant repeats and realleges each and every answer and denial contained in paragraphs numbered

First to Fourteenth of its answer, with the same force and effect as though fully set forth at length herein and, in addition thereto, alleges as follows:

Sixteenth: It denies each and every allegation contained in paragraph numbered Sixteenth of the complaint.

Seventeenth: It denies each and every allegation contained in paragraph numbered Seventeenth of the complaint.

As a First Defense

Eighteenth: The complaint fails to state a claim upon which relief can be granted.

[fol. 9]

As a Second Defense

Nineteenth: That, if the plaintiff sustained any injuries, as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's own negligence and were not caused or contributed to in any manner by any negligence of the defendant.

As a Third Defense

Twentieth: That the injuries to the plaintiff, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to the plaintiff at and before the said injuries were sustained and all of said risks, dangers and hazards had been assumed by the plaintiff.

As a Fourth Defense

Twenty-first: That, if the plaintiff sustained any injuries as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's own failure to perform the duties assumed as a term of his employment.

Wherefore, the defendant demands that the complaint be dismissed with costs to the defendant as against the plaintiff and that the Court grant to the defendant such other, further and different relief as the justice of the cause may require.

Kirlin, Campbell & Keating, By: Joseph M. Cunningham, A Member of the Firm, Attorneys for Defendant, Office & P. O. Address, 120 Broadway, New York 5, New York.

[fol. 10]

**Excerpts of Testimony**

The Court: Now, Mr. Friedman, do you have a claim here still for maintenance and cure? Is that in or out?

Mr. Friedman: That is in.

The Court: I will direct that that be tried to the Court only, and if there is any additional testimony necessary, I will hear that after the jury has rendered its verdict.

Mr. Friedman: I will respectfully except.

. . . . . .

Mr. Friedman: I don't know if it was made a part of the record yesterday, but, as your Honor recalls, it is the plaintiff's position that a jury demand was made in both causes of action.

The Court: Was there?

Mr. Friedman: I understand that it is the practice of this district to choose whether to submit this matter to a jury or to withhold it to the Court itself—

The Court: Are you talking about maintenance and cure?

Mr. Friedman: That is correct, maintenance and cure. I spoke of the case on the authority of Jenkins v. Walker, which is, of course, a First Circuit case in the District of Massachusetts, and in the discussion of that case by the Supreme Court in Romero v. International Terminal.

I respectfully submit that this is not a threshold in law but this is a matter of choice for the District Court, with all due respect. So the law, for the time being, is that a maintenance and cure count is a count founded in common-law. It is a remedy or right that accrues to a seaman from ancient history that existed prior to the establishment of the admiralty jurisdiction of the Federal Court, and it is also a matter to be brought on the law side, and, in fact, in the State Court, as is frequently done there, they elect

[fol. 11] to demand a jury. A jury has been duly demanded. The plaintiff is entitled to a jury on this action which is properly before this Court on a common-law basis. It may well be that he could have chosen to come here on an admiralty basis for maintenance and cure and so bar himself from a jury except to the extent that the Court would wish to call upon an advisory jury.

The Court: Is that all?

Mr. Friedman: Yes.

The Court: Well, it is my opinion that in this court, in the Second Circuit, it is permissible and authorized to try maintenance and cure to the Court. The only thing you said, Mr. Friedman, that has anything to do with this circuit is the possibility of Romero, and the Supreme Court cases have done something to the practice in this circuit. As I recall it, the cases definitely permit the trial to the Court of maintenance and cure in this circuit.

* * * * * * *

Andres Romero San Martin, the plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Friedman:

Q. What is your name?

A. Andres Romero San Martin.

Q. Mr. San Martin, when were you born?

A. 1897, December 31st.

Q. And where were you born?

A. In Spain.

Q. Mr. San Martin, have you ever worked as a seaman?

A. Since 1917.

Q. Now when did you come to the United States, Mr. San Martin?

A. 1915.

[fol. 12] Q. Since the year 1917 have you worked steadily as a seaman?

Mr. Danahar: The testimony was 1915.

The Court: That is when he says he came to the United States, Mr. Danahar.

Mr. Danahar: I am sorry.

The Court: And he served as a seaman, I believe he said, since 1917.

Q. Have you worked steadily as a seaman?

A. You mean since 1917?

Q. Yes.

A. Yes, sir.

Q. Now, did there come a time when you joined the crew of the SS American Reporter?

A. Yes, sir.

Q. And can you tell us in what year you joined the crew of the SS American Reporter?

A. In 1953; November 3rd of 1953.

Q. And what job did you have on the SS American Reporter?

A. I was a wiper.

Q. And in what city or port did you begin to work on the SS American Reporter?

A. Here in New York.

Q. Now for how long a period of time did you continue to serve on the SS American Reporter?

A. Until December 15, 1954.

Q. During the period from November 3, 1953, to November 5, 1954, was there any time that you did not work while you were on the SS American Reporter other than the days you were off duty?

A. I always worked on board.

Q. Do you recall the SS American Reporter arriving in the Port of New York on or about November 5, 1954?

The Court: Just yes or no.

A. I don't remember exactly.

[fol. 13] Mr. Friedman: I call for the deck log.

The Court: Well, maybe it will be conceded.

Mr. Danahar: I will concede it.

The Court: All right, it is conceded.

Q. On November 5, 1954, were you a member of the crew of the SS American Reporter?

A. Yes.

Q. Can you tell us whether or not during that day you signed any articles of any kind aboard the ship?

The Court: Yes or no.

A. I believe it was the 6th that we signed articles.

Q. In what part of the ship did you go through the process of signing the articles?

A. In the messroom, the officers' messroom.

Q. Do you recall what part of the day that signing on took place?

The Court: Does that make any difference?

Mr. Friedman: Yes, it does.

The Court: All right.

A. I believe it was 3 o'clock in the afternoon, 2 or 3 o'clock in the afternoon.

Q. Did you receive any orders to do any work aboard the ship at or about that time?

A. Yes.

Q. And what orders did you receive?

Mr. Danahar: I object to that unless we first establish from whom he received the orders.

The Court: Yes, from whom. First, from whom did you receive these orders.

The Witness: I received the orders from the engine utility.

[fol. 14] The Court: From what?

The Witness: Engine utility.

The Court: I don't know what that means.

Mr. Friedman: That is a—

The Court: No, he is going to testify.

Q. Do you recall the name—by what name you referred to that man?

A. Luis Manzo.

Mr. Friedman: Your Honor, I believe it will be conceded that Luigo Manzo was a member of the crew.

The Court: Is that so?

Mr. Danahar: Yes, sir.

Q. What orders, if any, did Luigo Manzo give you aboard the ship that day?

Mr. Danahar: Objection, your Honor.

The Court: On what ground?

Mr. Danahar: I don't think he is bound by an order of an engine utility man.

The Court: I don't know what the position is. I don't know what authority he had. If you don't show it—

Mr. Friedman: I just don't want to make a representation before the jury. May I approach the bench, if your Honor please?

The Court: Yes.

(The following took place at the bench not within the hearing of the jury.)

Mr. Friedman: The answer to the interrogatory states that the order was given through Arthur Quellmalz, the first assistant engineer of the ship. That is in the interrogatories.

[fol. 15] Mr. Danahar: I will concede that the first assistant engineer ordered Manzo to bring these stores aboard.

Mr. Friedman: All right.

Mr. Danahar: I will concede that, but I am not conceding any particular orders that Mr. Manzo might have given these men. I don't think that the defendant is bound by them. He is not an officer of the ship.

The Court: He is not an officer or non-commissioned officer or anything?

Mr. Danahar: No, your Honor.

Mr. Friedman: If it is a question of fact, we can prove it through the interrogatories that it was the general custom—

The Court: That may be general but you must also prove, I should think, that the orders came from this person.

Mr. Friedman: The interrogatories concede that the first assistant engineer directed that this cargo of four 100-pound drums and one 200-pound drum be loaded or carried aboard the gangway from the dock.

The Court: Why didn't you say that in the first place?

Mr. Friedman: That was conceded in the interrogatories.

The Court: Well, that will have to be read because otherwise it would not be before the jury.

Mr. Friedman: I did not want to interrupt the testimony.

The Court: All right, interrupt it and read it.

(The following took place within the hearing of the jury.)

* * * * * * *

[fol. 16] Mr. Friedman: I will start with Question 5:

"State whether or not on November 6, 1954, the S S American Reporter was loading or discharging cargo."

The answer by the United States Lines Company is:

"Loading."

Question 6—I think, if I may interrupt here, your Honor—

The Court: Well, what do you want to say?

Mr. Friedman: I want to say that counsel has stipulated that the date of the—

Mr. Danahar: Your Honor, I don't think that Mr. Friedman should be making these statements before the jury.

The Court: I don't think so either. If you want to confer privately and then make a stipulation, all well and good, but don't come out with an ex parte stipulation. They are not made that way. You confer and agree and if you have a stipulation then you may state it. I am not concerned with it. Just talk to him off the record.

(Mr. Friedman and Mr. Danahar confer at the rear of the courtroom.)

The Court: Have you agreed on something?

Mr. Friedman: Yes.

The Court: All right.

Mr. Friedman: It is stipulated that the date claimed for this alleged accident is Friday, November 5, 1954 rather than November 6, 1954. That is all.

The Court: Is that in the pleadings?

Mr. Friedman: It was on Friday—

[fol. 17] The Court: I am asking you a simple question.

Mr. Friedman: Well—

The Court: It is not conceded that anything happened, but it is conceded that the alleged date is November 5th and the pleadings are amended accordingly; is that so?

Mr. Friedman: Yes.

The Court: And is it so stipulated?
Mr. Friedman: Yes.
The Court: Go ahead.
Mr. Friedman: Question 6:

"With reference to the S/S American Reporter, on November 6, 1954 state whether there were any barrels of cement loaded aboard said vessel."

The answer to the question is: "Yes."

Question 7:

"If the answer to the preceding interrogatory is in the affirmative, state the number of barrels of cement which were loaded aboard said vessel and the weight of each barrel."

The answer is:

"Four 100-pound drums and one 200-pound drum."

Question 8:

"State whether plaintiff was assigned to load barrels of cement aboard the S/S American Reporter on November 6, 1954."

The Court: Is this changed to November 5th now?
Mr. Friedman: That's correct.
The Court: Read it as though it were changed.
Mr. Friedman: The answer is "Yes."

[fol. 18] Question No. 9:

"If the answer to the preceding interrogatory is in the affirmative, state the name and address of the person on behalf of the defendant who ordered plaintiff to load barrels of cement aboard the S/S American Reporter on November 5, 1954."

And the answer is:

"Arthur Quellmalz, 190 Riverside Drive, Denville, New Jersey."

The Court: Suppose you spell that last name.
Mr. Friedman: Q-u-e-l-l-m-a-l-z.

And if I may refer back to Question No. 4 of the interrogatories:

> "State the names, Coast Guard certificate numbers and addresses of the following officers and members of the crew of the S/S American Reporter covering period including November 6, 1954" and (c) is: "First assistant engineer."

The answer to (c) is "Arthur Quellmalz."

The Court: All right, he is the first assistant engineer. What is next? Is that all from the interrogatories now?

Mr. Friedman: No, the next one is 10.

> "State the names and addresses of all other members of the crew who were assigned to load barrels of cement aboard the S/S American Reporter on November 5, 1954."

The defendant's answer to that question is:

> "Luigo Manzo (deceased); Ralph Murrell, 1063 Teller Avenue, Bronx, New York; Jose A. Rosales, [fol.19] 19 East 118th Street, New York, N. Y.; Andres San Martin."

And the next question is:

> "If the answer to interrogatory No. 8 is in the affirmative," which was, "state whether the plaintiff was assigned to load barrels of cement."
>
> "State the means by which such barrels of cement were brought aboard said vessel."

The Court: That is, the way in which they were brought aboard, irrespective of what the order was? Is that it?

Mr. Friedman: Yes.

The Court: All right.

Mr. Friedman: Answer to No. 11:

> "Rolled or carried by crew."

The Court: All right. Next.

By Mr. Friedman:

Q. Now, the testimony was you signed certain articles in the messroom and received certain orders. Now, what work did you do that afternoon on November 5, 1954, if any.

Mr. Friedman: I will withdraw that question.
The Court: It is withdrawn.

Q. Where did you go from the messroom, if any place, on the afternoon of November 5, 1954?
A. I went to load the barrels of cement from the dock.
Q. Now, did you go to the dock, sir?
A. Yes.
Q. What did you find on the dock when you got there?
A. There were four or five barrels of cement and a few other packages.
Q. Approximately how far was this material from the gangway of the ship to the dock?

[fol. 20] The Court: The cement, I assume you mean.
Mr. Friedman: The cement, the material.

A. About four or five feet from the dock to the gangway.
Q. What did you do with the barrels of cement?
A. I picked up one and brought it on to the ship.
Q. Who else, if anybody, was present at that time and at that place?
A. There were three wipers there and the engine utility man.
Q. Did you have any conversation with the engine utility man?

Mr. Danahar: If your Honor please, I ask that the witness be instructed to answer that question yes or no.
The Witness: Yes or no.

A. Yes.
Q. What did you say to him?

Mr. Danahar: Objection, your Honor.
The Court: Sustained.

Q. Did you receive any instructions from the engine utility man?

Mr. Danahar: Objection, your Honor.
The Court: Sustained.
Mr. Friedman: I note my exception.

Q. What did you do, if anything, after you carried aboard this barrel of cement?
A. I went down to the dock and started to load another one.
Q. Was the gangway between the dock—strike that.
Where was the gangway attached to on the ship?
A. At the side of the ship.
[fol. 21] Q. Along what hatches?
A. Between the third and fourth, I believe.
Q. Was the gangway at an angle?

The Court: What is that?

Q. Was the gangway at any angle?
A. It was tied with the line.

Mr. Danahar: I did not get that.
The Court: He says it was tied with the line, whatever that means, and whether that is at an angle.

Q. Can you show us or tell us—

The Court: Make it one or the other.

Q. Was there any person in charge of your work in carrying these stores from the dock up to the main deck?
A. Yes, the engine utility man.
Q. And his name is—

Mr. Danahar: I object to that.
Mr. Friedman: Well, it is conceded.
The Court: Just ask him what his name was; don't lead him.
Mr. Danahar: Your Honor, I would also ask your Honor to instruct this witness to answer yes or no to questions because—
The Court: I have so indicated and I will ask him to do it again through the interpreter. Mr. San Martin, I instruct you to answer the questions that are asked and no other questions. If it calls for a yes or no answer, just give it that way.
The Witness: All right.

Q. Do you know who, if anybody, put the engine utility man in charge of this loading operation?

[fol. 22] The Court: Of his own knowledge.

Q. Do you know who if anyone put the engine utility man in charge of this loading operation?

A. Yes.

Q. And who was that?

A. The first assistant.

Q. The first assistant what?

A. (In English) The first assistant engineer.

The Court: He can speak more English than appears.

Mr. Friedman: Those words are used on a ship.

The Court: He understands some English.

Mr. Friedman: Yes.

Q. Now, I ask you, Mr. San Martin, what instructions, if any, did you receive regarding loading these stores and from whom?

Mr. Danahar: I object to that.

The Court: Of course, you have not shown how this was known to him. He gave the title of first assistant engineer, but I assume something was either heard or said by him and you will have to elicit that.

Mr. Friedman: Again I think that goes—

The Court: I said you have to elicit it, Mr. Friedman. I don't want any more argument about it. If you want to abandon that, then I would sustain the objection. You take your choice.

Q. How do you know, if you do—

The Court: The point is, did he hear anything said by the first assistant to the utility engineer or the engine utility man, I believe it is.

Did you hear some conversation between the first assistant engineer and the utility man, yes or no.

[fol. 23] The Witness: Yes.

The Court: What was it? What was said?

The Witness: That he gave orders to him to have these barrels of cement loaded on.

The Court: Is that all?

The Witness: Nothing else.

Q. Mr. San Martin, was there any other way other than carrying these barrels of cement up the gangway to bring them from the dock to the deck?

A. Yes.

Q. What other way was that?

A. With the winch.

Q. And were any winches provided to you to use for this loading job on November 5, 1954?

Mr. Danahar: I object to that.

The Court: I will allow it.

Mr. Danahar: I think it is too general.

The Court: I will allow it. This may be difficult with the witness. You may cross-examine.

A. No.

Q. Mr. San Martin, did you carry a second barrel of cement up the gangway on November 5, 1954?

A. Yes, sir.

Q. How did you carry it?

A. Holding it over here (indicating).

The Court: Indicating what?

The Witness: On the left.

The Court: On the left shoulder?

The Witness: On the left shoulder.

Q. What if anything happened while you were carrying this barrel of cement?

A. Yes, something happened.

Q. Tell us what.

A. When I was carrying this barrel of cement the barrel moved—and the gang place ladder moved. I had to hold [fol. 24] on to the line of the ladder, and I was moving like this, back and forth. That is all I know.

Mr. Danahar: May we have for the record, your Honor, how he was moving.

The Court: How were you moving?

The Witness: From one side to the other—from one side to the other.

Q. Did you feel any pain at this time?

Mr. Danahar: Objection, your Honor, as leading.

The Court: I don't know what happened. Have you elicited all that happened? He moved from side to side?

The Witness: Yes.

The Court: Now the next is, did he suffer pain?

Mr. Friedman: Yes.

The Court: Well, if that is all, if you are through with that part of it, I will allow this question. I don't know what it means but that is for the jury. Go on.

Q. Did you experience any pain?

A. Yes, sir.

Q. Where?

A. In the back and my left leg.

Mr. Danahar: Your Honor, may we have the witness indicate where on the back he felt pain.

The Witness: Yes. Indicate where on your back. Stand up.

(Witness indicates.)

The Court: He indicates a little above the waist. Is that so, Mr. Friedman? Will you give some attention here. He is indicating, I say, a little above the waist. Does that satisfactorily describe what he has indicated?

[fol. 25] Mr. Friedman: Yes.

The Court: What about the leg, before you sit down.

The Witness: Along the entire leg, sir.

The Court: And he is pointing to the thigh—the upper thigh of the left leg.

Mr. Danahar: In the back, your Honor.

The Court: Towards the rear.

The Witness: Well, I say in my back, but my spine and along my entire leg.

Q. Did the barrel fall down at this time?

Mr. Danahar: Objection, your Honor.

The Court: Sustained as leading.

Q. What if anything happened to the barrel?

A. It fell down to the deck.

Q. What did you do next?

A. At that time the first assistant engineer came along.
Q. And then what happened?
A. And I told him that the work was dangerous.

The Court: Is that all you told him?
The Witness: From what I recall, nothing else.

Q. And what did you do after that?
A. I went down and went to work on the others.
Q. And what type of material did you go to work on then?
A. Light weight objects.
Q. And how much longer did you work that day?
A. Until about a quarter of 5.
Q. And did you do any work on the next day?
A. No, it was a Saturday, and the following Sunday, no work.
Q. And were you on the ship the next day, that is, a day after this accident, the carrying aboard of the barrels of [fol. 26] cement, were you on the ship or off the ship?
A. I was aboard.
Q. And how long did the ship remain in New York?
A. I believe it sailed on Monday.

Mr. Friedman: I believe it will be conceded that November 5, 1954, was a Friday.
Mr. Danahar: Yes.
The Court: I assume it is stipulated that it sailed on the 8th, if it makes any difference. Does it appear anywhere at all?
Mr. Danahar: What is the question?
The Court: He wants to know the date of sailing.
Mr. Danahar: From where?
The Court: From New York.
Mr. Danahar: Well, if your Honor please, I think it left the Brooklyn Army Base and went to some other place in New York. As a matter of fact, he can put the log book in evidence and I have no objection.
The Court: Put it in and then you will have it all before you.
Mr. Friedman: All right.
The Court: Plaintiff offers the log book, no objection, mark it in evidence.

(Received and marked Plaintiff's Exhibit 1 in evidence.)

Mr. Friedman: This is the deck log book, Voyage No. 54 of the SS American Reporter, which runs from Sunday, October 24, 1954, to December 9, 1954.

This log book shows that it arrived at Brooklyn Army Base on Friday, November 5, 1954, in the morning, was secured to the pier at the Brooklyn Army Base at nine [fol. 27] minutes after 8 in the morning on Friday, November 5, 1954.

The log book also shows an entry that at 1345, which is 1:45, the United States Shipping Commissioner came aboard on Friday, November 5, 1954.

The Court: You don't need to give all of those details. Let us get on. The ship, I suppose, left that night some time.

Mr. Friedman: Yes, it left the Brooklyn Army Base on Sunday, November 7th at 6:40 in the morning.

Mr. Danahar: And from the Brooklyn Army Base it went to a pier on the Hudson River that day, Sunday, November 7, 1954, and in the evening of that day departed from the Hudson River on a voyage to Europe to the Port of London. That is confirmed by what is in the log. Is that right?

Mr. Friedman: Yes.

Mr. Danahar: Do you agree, Mr. Friedman?

Mr. Friedman: Surely.

The Court: All right, let us get on with this.

Q. Were you aboard the SS American Reporter during this voyage when it left New York on or about November 7, 1954?

A. Yes.

Q. What was your job during that voyage?

A. I continued doing my work in the engine room.

Q. And tell us whether during that entire voyage did you miss any work at all?

A. Yes.

Q. Did you miss any work on the voyage from New York to London?

The Court: He just said yes.

Q. From New York to London?

A. No.

[fol. 28] Q. Did you miss any work on your return voyage from London to New York?

A. Yes.

Q. And why did you miss work?

A. I was sick.

Q. And can you describe your sickness?

A. My back hurt.

Q. And can you tell us when that back pain started?

A. From the moment that I had that accident on the gangway.

Mr. Danahar: I move to strike that out, that he had an accident.

The Court: Yes, strike it out. The time is an essential feature of the answer. Was it on November 5th?

The Witness: Yes, sir.

Q. And can you tell us whether the pain changed in any way during the period from November 5, 1954, to December of 1954?

A. Yes, sir.

Q. And in what way did it change?

A. I felt much worse.

Q. Now did you—answer this yes or no—did you tell anyone about this pain?

The Court: Anyone?

Q. I just want a yes or no for that. Did you tell anyone on board the ship of this pain?

Mr. Danahar: I object to that, your Honor.

The Court: Yes, he might have told half the crew.

Mr. Friedman: I don't want to lead.

Q. Did you tell any security officer aboard the ship about your pain?

A. Yes, sir.

[fol. 29] Q. Who did you tell?

A. The first engineer.

The Court: When?

The Witness: When the boat was on its return voyage.

The Court: When on the return, how long out of London?

The Witness: I really can't tell you exactly what day it was. I would say a day or two out of London.

Q. Was there any reason why you didn't tell it before that day?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Q. Why did you tell him then?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Mr. Friedman: I offer in evidence the medical log of the SS American Reporter.

The Court: Just relating to this?

Mr. Friedman: Solely.

The Court: What is the date?

Mr. Friedman: There are two dates, 12-4-54 and 12-15-54. It is one line. They go by name.

The Court: All right, read it in if there is no objection.

Mr. Danahar: There is no objection.

The Court: Read it.

Mr. Friedman: I would like to offer it in evidence itself, your Honor.

The Court: I said read it. You don't need to offer a whole book if it is just a line that you want. There is no [fol. 30] doubt what is in there so just read it and that makes it in evidence.

Mr. Friedman: (Reading) Name, San Martin; give crew rating, wiper; date and hour injury or illness originated, 12-4-54; disease or injury, sprain, light pain still present at right leg—

Mr. Danahar: That is the second entry you are reading, not the first one.

The Court: You better offer the whole thing then so that there is no error. I thought you said it was a line but it is obviously more than a line. Just that portion relative to this, plaintiff will be marked in evidence. You may read the rest of it, if there is any more.

Mr. Danahar: Yes, there is, your Honor.

Mr. Friedman: Under date of discharge, blank. Condition of patient on discharge, that is blank. Time off for duty in bay, none.

Master's certificate issued and man relieved for coastwise and foreign voyage.

Under the heading, "Was accident report made?" "Yes."

I am going to read another entry in the same book of an earlier date. Andres San Martin—

The Court: What date is this?

Mr. Friedman: Well, apparently 12-5-54. Wiper. Date and hour injury or illness originated, 12-4-54. Date treated, 12-5-54. Disease or injury: soreness in muscle or right leg. Date of discharge, blank. Oil of Wintergreen and heat.

Was accident report made? Yes.

Mr. Danahar: Why don't you finish the answer, Mr. Friedman?

The Court: If you are going to read it, read all of it.

[fol. 31] Mr. Danahar: Isn't there something else that appears there?

Mr. Friedman: What else?

Mr. Danahar: Doesn't the word "No" also appear there?

Mr. Friedman: We offer this in evidence, your Honor.

The Court: Yes, and now if there is any part that has not been read, Mr. Danahar, you may read it.

(Received and marked Plaintiff's Exhibit 2.)

The Court: The jury may examine it.

Mr. Danahar: I am now reading from the last entry that Mr. Friedman read from.

Under the column, "Was accident report made out," there also appears the word "No," and over the word "No" there appears the word "Yes." So which was put in first I don't know.

Mr. Friedman: We certainly don't know that, your Honor. Let the jury decide.

The Court: We will have a recess at this time, just for about five minutes.

(Recess.)

The Court: All right, Mr. Friedman.

Mr. Friedman: I just received a deposition and I want one minute to find a page.

The Court: What is that for? You have a witness in the box.

Mr. Friedman: It is a point that we are right on now.

The Court: All right. It is a little bit ragged to do it this way. Is this a deposition in this case?

Mr. Danahar: Yes, it is, your Honor.

The Court: May I see it?

[fol. 32] Mr. Friedman: We just received this yesterday afternoon and it was only taken last Friday.

The Court: All right, start in. What page are you on?

Mr. Friedman: Page 63, your Honor.

The Court: You better start in with who he is first.

Mr. Friedman: This is the deposition taken before trial of one William McManus, at this time the captain and at the time of the accident the first officer or the chief officer.

The Court: Is that in the record somewheres?

Mr. Friedman: Yes, I believe so.

Mr. Danahar: I will concede that.

The Court: All right, it is conceded.

Mr. Friedman: And Mr. McManus testified as a representative of the shipping company on a deposition which he duly swore to on that date, some time last month.

The Court: May 6th; it was not last month.

Mr. Friedman: I am sorry, and I now quote from this portion of Captain McManus' deposition. This is at page 63:

"Q. Do you know whether he received medical attention or treatment of any kind aboard the ship?"

The Court: Where is that?

Mr. Friedman: At the bottom of page 63 the third question up.

The Court: All right.

Mr. Friedman: "Do you know whether he received medical attention or treatment of any kind aboard the ship?

[fol. 33] "I do know that he did get medical treatment. It was listed in the ship's medical log. I know that from reading the log during the voyage.

"Q. And when a man reports an injury what then occurs, do you make out an accident report of any kind?

"A. That is correct.

"Q. And what is done with that accident report that is made out?

"A. Well, a copy is kept in the vessel's records, and the original and the rest of the literature and paraphernalia connected with it are sent to our office in New York at the end of the voyage."

The Court: Is that all now from McManus?

Mr. Friedman: I now ask—

The Court: I said, is that all now from Mr. McManus?

Mr. Friedman: Yes.

The Court: All right.

Mr. Friedman: I now ask, your Honor, for the production of that accident report by this shipping company.

The Court: Mr. Danahar?

Mr. Danahar: Your Honor, I have been trying since I received this case for handling to locate that accident report and I have been unable to do so.

The Court: Are there any traces of it?

Mr. Danahar: No, sir.

The Court: All right, that is your answer.

Mr. Danahar: I might also point out that I think it is immaterial because—

The Court: Well, we won't go into that now.

[fol. 34] By Mr. Friedman:

Q. Where did the voyage end, Mr. San Martin, in what port?

A. Here in New York.

Q. And did you obtain any document of any kind from the ship's officers before you left the ship?

A. Yes, sir.

Q. And what was that document?

A. A letter to the hospital.

Q. And after leaving the ship did you go to the hospital?

A. Yes.

Q. What hospital was that you went to first?

The Court: What hospital did you go to?

The Witness: Hudson & Jay.

Q. And did you see a doctor there?

A. Yes.

Q. And did you tell him anything in regard to any pain you may have had?

A. Yes.

Q. What did you tell him about your pain?

A. I told him about the pain I was suffering in my back and my left leg.

Mr. Friedman: If I may hold the questioning for a moment, the jury hasn't completed examining the medical log.

The Court: All right.

Mr. Friedman: Will your Honor tell the jury there are two pages?

The Court: There are two entries, one on the 4th of December and one on the 5th, I believe.

Mr. Friedman: I believe one is on the 5th and on the 15th, your Honor.

The Court: Is that right? That was not my understanding but I may be wrong. They speak for themselves. They are on two separate pages and one follows the other, I believe.

[fol. 35] Mr. Friedman: Yes, your Honor, if we could attach a clip to the pages—

The Court: All right, attach a clip. There is a check mark, I think, made on each item with a pencil.

Go on now, Mr. Friedman.

Q. Mr. San Martin, did the purser aboard the SS American Reporter in November and December, 1954, speak Spanish to you?

The Court: What is this, did he speak Spanish?

Mr. Friedman: Yes, the Spanish language.

A. No.

Q. And did you, Mr. San Martin, at any time ever write in that medical log?

A. No.

The Court: Do you speak some English?

The Witness: (In English) Yes, a little.

Mr. Danahar: What was that answer, please?

The Court: "A little."

Q. Now at the Hudson & Jay Clinic, did the doctor ask you how long you had the pain?

Mr. Danahar: Yes or no, please, your Honor.
The Court: Just yes or no.

A. Yes.
Q. And what did you tell him?

Mr. Danahar: Objection, your Honor.
The Court: Is this something that is different from the log or rather, the record of Hudson & Jay? Is that the point?
[fol. 36] Mr. Friedman: Well, it is—as to that question, no, your Honor.
The Court: Then why don't you offer the Hudson & Jay record?
Mr. Friedman: I won't go into it too much, your Honor.
The Court: All right, sustained.

Q. Did the doctor ask you how the pain began?

Mr. Danahar: Objection, your Honor.
The Court: Sustained. I suppose there is a record of it there. If there is some question about it, then you can go further but it seems to me to be anticipatory.

Q. What did you tell the doctor with regard to how long you had pain?

Mr. Danahar: I object to that.
The Court: Sustained—it is the same question—unless it is something that was stated to the doctor who was treating him. Go on with this case and we will get along faster.
Mr. Friedman: Supposing it was the treating doctor—
The Court: At Hudson & Jay they did not just look at him, did they? And this, by the way, I assume is conceded to be a public health clinic, is it not?
Mr. Danahar: Yes, sir.
The Court: And both sides so concede and stipulate that that is so.
Mr. Danahar: Yes, where [illegible] get free treatment.
The Court: Yes, that is conceded by both sides.

[fol. 37] Q. After the Hudson & Jay Clinic, did you go to any other medical institution?

A. No, sir.

Q. Were you ever at the medical institution at Staten Island, at the Marine Hospital at Staten Island?

A. Yes, sir.

Q. And do you recall when you went there?

A. I believe it was the 20th of December of 1955.

Q. Then some time after you got off the ship you went to Hudson & Jay Clinic and then afterwards to the Staten Island Marine Hospital, is that correct?

The Court: He said December, 1955.

Mr. Friedman: 1954.

The Witness: I am sorry, I meant 1954.

(A short pause.)

The Court: Next question, if there is going to be any.

Q. How long did you stay at the Staten Island Marine Hospital approximately?

A. About two months.

Mr. Danahar: Your Honor, may I confer a minute with Mr. Friedman? I think he is somewhat mistaken about this.

The Court: Why don't you put the records in?

Mr. Danahar: I have no objection to these photostats going in subject to confirmation with the original records when they get here.

The Court: Do you want to offer them?

Mr. Friedman: I will put them in.

The Court: You offer a photostat of the record of the Marine Hospital, is that right?

Mr. Friedman: There are two exhibits there, by the way, one Hudson & Jay and the other Marine Hospital.

(Received and marked Plaintiff's Exhibits 3 and 4.)

[fol. 38] The Court: I would like to see them unless you want to use them.

Mr. Friedman: Yes, I will want to use them.

The Court: All right, you take them then.

Mr. Friedman: The date of admission to the Staten Island Hospital, United States Public Health Service Hospital at Stapleton, Staten Island, is January 12, 1955, and

the date of discharge is March 1, 1955, and the number of days hospitalized is 48 days.

Does your Honor want these now?

The Court: I want to see you go on and ask some questions and see if we can get through with this witness.

Q. After you left the hospital on March 1, 1955, where did you go?

A. I went to the company.

Q. Well, where did you go to live?

A. 433 19th Street.

The Court: Manhattan or Brooklyn?

The Witness: West 19th Street, Manhattan.

Q. Now since 1955 until today where have you lived, in what city?

A. I now live at a different address but most of the time I lived there.

Q. And what type of home do you have there?

Mr. Danahar: I object to that.

Q. Was this a hotel or a furnished room or an apartment of your own?

Mr. Danahar: Objection. I don't see the materiality.

The Court: Sustained. I don't know what difference this makes.

[fol. 39] Mr. Friedman: Does your Honor want a discussion—

The Court: No, I don't want a discussion. I want you to get on with this case. I have sustained the objection. I don't know what that has to do with it.

Q. Did you engage in any employment from the time you left the hospital on March 1, 1955, until today?

The Court: Just yes or no.

A. No.

Q. Did you live with any other people during this time?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Mr. Friedman: I would like to make an offer, your Honor.

The Court: Well, you will have to make it later. Go on.

Q. After you left the hospital did you have any feelings of pain of any kind?

A. Yes.

Q. And describe those pains, please?

A. In my back and in my left leg.

Q. Did you see any doctors during that time?

The Court: This is after—

Mr. Friedman: After he left—

The Court: —after he left the hospital on March 1, 1955.

The Witness: Yes, sir.

Q. And what were the recommendations of these doctors with regard to your working?

[fol. 40] Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Q. Now, Mr. San Martin, going back to the gangway on November 5, 1954, I would like, if you would, to describe the construction of that gangway; tell us what it was made of.

The Court: He observed it, I suppose. You have to lay some groundwork for this.

Q. On November 5, 1954, were you at any time on the gangway?

The Court: Just yes or no.

The Witness: Yes.

Q. Tell us what you observed from your observation; tell us, describe to us the construction of this gangway.

The Court: Did you look at the gangway, yes or no.

The Witness: No.

Q. Did you walk on the gangway?

A. Yes, sir.

Q. Were your eyes open or closed while you walked on the gangway?

A. Open.

Q. Tell us what you saw.

The Court: He said he didn't see the gangway. I don't know if he can tell what he saw if he didn't see it.

A. It was in this manner; it was about on an angle of 25 degrees.

[fol. 41] The Court: An angle of 25 degrees?

The Witness: 25 degrees and it had lines.

Q. Where were these lines?

A. Right alongside the gangway, one on top and one below.

Q. What were these lines made of?

A. I believe it would be rope.

The Court: Did you look at it, yes or no?

The Witness: No.

The Court: Then how is he going to tell what it looked like or what it was made of.

Q. How far apart—strike that. You say it was one rope above the other—

The Court: Are you going to lead him now?

Mr. Friedman: I am just stating this, your Honor.

Q. How many lines of ropes were there?

The Court: I don't know that he has testified that they were rope.

Mr. Friedman: He just said so, your Honor, if I can have read back the last two or three questions.

The Court: He testified he didn't look at it.

Did you look at anything on the gangway, yes or no.

The Witness: I certainly look at it when I am walking down.

The Court: That does not answer the question. Did you look at the gangway at any time?

The Witness: Yes.

The Court: What did you see, if anything, on the sides of the gangway or above the gangway?

The Witness: Cords, rope.

The Court: Cords?

[fol. 42] The Witness: It could be cord, rope or line.

The Court: All right, go on.

The Witness: One on the top, one on the bottom, on both sides.

The Court: All right.

Q. Can you tell us whether those ropes were taut or loose?

Mr. Danahar: Objection, your Honor. That is a leading question.

The Court: Yes, sustained.

Q. Tell us what was the condition of those ropes.

A. They are not very taut; somewhat slack.

Q. As you went up the gangway carrying the drum of cement, the second drum, did you come into contact with the rope handrail?

Mr. Danahar: Objection, your Honor.

The Court: Sustained.

Q. Can you tell us what use, if any, you made of the handrail as you carried the second drum of cement up the gangway?

A. Well, when I was moving from side to side I grabbed hold of the handrail with my hand.

Q. When did you move from side to side?

A. When I was going up with the barrel.

Q. Why did you move from side to side?

Mr. Danahar: I object to that, your Honor.

The Court: Sustained.

Q. What if anything caused you—

The Court: Isn't that just about the same question?

[fol. 43] Mr. Friedman: Yes, your Honor, but I must say, very respectfully, I fail to see the objection which relates to this question.

The Court: Ask your question.

Q. Did you move from side to side when you carried the first barrel of cement up the gangway?

A. No.

Q. What if anything was different at the time you carried the second drum of cement up the gangway?

A. Well, when I went up with the second barrel it seemed that the gangway was not moored properly and it moved.

Mr. Danahar: I object to that.

The Court: Strike out that it was not moored properly.

Mr. Greco: I join in that objection.

The Court: The gangway moved. That is all that is admissible.

Q. What happened when the gangway moved?

A. Well, at that time, when the gangway moved, I moved from side to side with the barrel of cement on my shoulder, and at that time I felt a pain in my back.

The Court: How did the gangway move?

The Witness: Well, I say that it moved from side to side. There may have been some wind—

The Court: Strike out that there may have been some wind. He says it moved from side to side. Is that your answer?

The Witness: Yes, it moved from side to side.

The Court: All right.

Q. Now before November 5, 1954, Mr. San Martin, did you ever have any pain in the lower part of your back and in your left leg?

A. No, sir.

[fol. 44] The Court: Never?

The Witness: No, never.

Q. Do you have any such pain at this time?

A. Yes, at this very moment—

The Court: Yes or no.

The Witness: Yes, sir.

Q. Describe those pains, please, to us? I don't mean at this particular moment but I mean—

The Court: When do you mean?

Q. Do you have these pains all the time, every minute of the day, or does it come and go?

A. I have it ... the time, sir.

Q. Describe to us, if you would, just how and what the pain is.

A. Right in the back and my left leg, along my entire left leg.

Q. Do you ever pick anything up?
A. No.
Q. Are you able to bend down without feeling pain?
A. No, no.
Q. Did you receive any money other than your wages from the shipping company—let me withdraw that.
After the end of the voyage, when you went to the shipping company's office, tell us what happened there.

Mr. Danahar: Your Honor, I object to that.
The Court: I don't know what the purpose of this is.
Mr. Friedman: It is a matter of payment. We have to prove what demands were made and what was received.
The Court: That question calls for a conversation, I suppose.
[fol. 45] Q. Did you receive anything, not conversation, did you receive anything at the shipping company office?

Mr. Danahar: I object, your Honor. I don't see the materiality of it.
The Court: Sustained.

Q. Other than the medical treatment at Hudson & Jay and Staten Island Hospital, did you pay anybody else—

The Court: First, did he get any other treatment.

Q. Did you receive any treatment from any other doctor?

The Court: Yes or no.

A. I don't understand the question.
Q. Did you go to see any other doctors? Did you go to see any doctor since March, 1955, in your neighborhood or anywhere else?
A. Yes.
Q. And why did you go to see these d ctors?

Mr. Danahar: Objection, your Honor.
The Court: If it relates to this alleged injury I will allow it.
Was it about your back or your leg or what?
The Witness: Yes, certainly, my back and my leg.

Q. What treatment if any—

The Court: Fix the time and the name of the doctor before you get to the treatment, instead of operating in a vacuum.

[fol. 46] Q. Do you recall the name of the doctor you went to see?

A. Yes, Dr. Lucas. I don't know the first name—Dr. Lucas.

Q. About how many—

The Court: Will you fix the time, Mr. Friedman?

Q. Do you recall the time—give us your best approximation of the time you went to see Dr. Lucas, when?

A. I don't recall the month but it was in 1955.

Q. Did you ever go to see him after 1955?

A. Yes.

Q. Was that in the year 1956?

A. Yes.

Q. Did you ever go to see him after the year 1956?

A. Yes.

The Court: Is this doctor going to be here?

Mr. Friedman: No, your Honor, unless Mr. Danahar will stipulate that—

The Court: I am not discussing that. He went to Dr. Lucas some time in 1955 and some time in 1956. That is all that we have so far.

Q. Did you see him at all in 1957?

A. Yes, sir.

Q. And was this in connection with any pains to your back?

A. Yes, always for the same reason, pain in my back and my left leg.

Q. And what treatment did Dr. Lucas give you?

A. He just gave me some pills.

Q. And what did you pay to him, if anything?

A. I paid him $5 for each visit.

The Court: And all he did was give you pills is that right?

The Witness: That's right, nothing else.

Mr. Friedman: Your Honor, may I come up?

[fol. 47] The Court: I wish this case would proceed without these interruptions from time to time. It should have been prepared.

(Conference at bench not within the hearing of the jury and off the record.)

(The following took place within the hearing of the jury.)

The Court: Go on.

Q. At the place where you lived since leaving the hospital in March, 1957—

The Court: Make it a specific place.

Q. At 433 West 19th Street—

The Court: Have him testify.

Mr. Friedman: He did testify to that.

The Court: All right, go on. Don't argue with me.

Q. Was there anybody else living with you? What kind of a dwelling was it? What type of accommodations did you have there?

The Court: I am allowing this only if it is connected and if it is shown to be something that necessarily flowed from this alleged accident or alleged physical condition as a result thereof. If it is not shown I will strike the testimony out.

A. I had a room there.

Q. Now, who took care of your room in cleaning it up?

A. The janitor.

The Court: Did the janitor do it for everybody else?

The Witness: Sure.

[fol. 48] Q. Did you—

Mr. Danahar: Your Honor, as long as he did it for everybody else I don't think that it is material—

The Court: I don't see what basis you have for it, but go on. I hope that you will try to get a little facility in progressing here.

Q. Now, Mr. San Martin, did you live with anybody else or did you live in another place besides 433 West 19th Street since you left the hospital in March, 1955?

A. Yes.

Q. Now, Mr. San Martin, did you do your own shopping?

The Court: I don't see any background for that. You will have to lay some groundwork for it. He walked to court today, and from the rear of the courtroom he walked into the witness box.

Mr. Friedman: Well, if your Honor means that—

The Court: I am not telling you what you should do but there ought to be a groundwork for it, if you expect to get this testimony in. I am not going to run your case for you.

Q. Do you do your own shopping, Mr. San Martin?

A. No, sir.

The Court: There are a lot of men who do not do their own shopping, so what does that show?

Mr. Friedman: It only goes to the weight of the evidence.

The Court: Get some proof instead of talk. I am going to recess now until 2 o'clock, and by that time I hope that you will have some questions ready for this witness.

Don't discuss this case.

(Recess to 2 P. M.)

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[fol. 49] Afternoon Session 2 P. M.

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The Court: You may go on, Mr. Friedman.

ANDRES ROMERO SAN MARTIN resumed.

Direct examination.

By Mr. Friedman (Continued):

Q. Mr. San Martin, would you describe to us as of the last time you worked aboard the SS American Reporter

what your duties and activities aboard the SS American Reporter were?

A. The last job that I had was loading these barrels.

Q. So that you worked—did you work as a wiper aboard the SS American Reporter?

A. Yes.

Q. Tell us the things you did, the work you did as a wiper aboard the SS American Reporter?

A. Painting, washing down and scraping.

Q. How many hours a day did you work?

A. Eight hours.

Q. Now since you left the SS American Reporter have you done any work?

A. No.

Q. Why not?

Mr. Danahar: Objection.

The Court: Yes, in that form.

Q. What have you done, what activities have you had?

Mr. Danahar: Objection.

The Court: Well, he said that he has not worked, so what difference does that make?

Mr. Friedman: I think it makes a difference.

The Court: Suppose he is engaged in fishing, I don't know.

Mr. Friedman: I think the question of what activity, if any, he is permitted to do, may be of some relevance.

[fol. 50] The Court: What you want to ask about of course is his physical condition, I assume.

Mr. Friedman: I seek to elicit, if your Honor please—

The Court: All right, ask your own questions. I sustain the objection to the last question.

Q. What is your physical condition at this time, Mr. San Martin?

The Court: From your own observation.

A. I feel ill.

The Court: All right, he feels ill.

Q. Would you describe the illness that you feel?

A. I cannot walk very much; I can't go up and down very much.

Q. How much walking do you do?

A. Three or four or five blocks, something like that.

Q. What happens after you walk three or four or five blocks?

A. I have to sit and rest.

Q. Do you climb any stairs?

A. No, I just go to the first floor.

Q. How do you feel after you climb to the first floor?

A. I feel tired.

The Court: You go up one flight of stairs?

The Witness: Yes.

The Court: How many times a day?

The Witness: Once or twice.

Q. What do you do besides walking three or four or five blocks?

A. I go back upstairs, I lie down for awhile, I get up and watch television, and then rest again.

Q. And about how much time a day do you spend resting?

A. I would say three quarters of the day.

[fol. 51] Q. Does anybody help take care of you?

A. Yes.

Q. What help does he give you?

A. He helps me in every way. He cleans around the apartment and he cooks and prepares the meals.

Q. Now, Mr. San Martin, with regard to this barrel of cement, the drum of cement that you testified you carried up the gangway on November 5, 1954, do you know what that material was used for aboard the SS American Reporter?

A. This would be for the furnace.

Q. In what way is it used in the furnace?

A. The cement is used for the flat, the bottom of the furnace, as well as the brick portion of the furnace.

Mr. Friedman: Now I ask to have marked for identification as Plaintiff's Exhibit No. 5 this metal drum.

(Marked Plaintiff's Exhibit 5 for identification.)

Q. Now, Mr. San Martin, will you come down from the witness stand and take a look at Plaintiff's Exhibit No. 5 for identification.

The Court: Can't he see it from here?

Mr. Friedman: I don't know.

The Witness: I can see it from this point.

Q. Can you tell us, Mr. San Martin, in your observation what it is?

A. I believe that that is the cement.

Q. Can you tell us whether this drum is identical in size and shape with the drums that you carried up the gangway on November 5, 1954?

A. Yes, exactly.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Friedman: I offer it in evidence.

The Court: Any objection?

Mr. Danahar: Yes, I do, sir. I think we should know the weight of it—

The Court: Know the weight?

[fol. 52] Mr. Danahar: Yes, sir.

The Court: I don't know about its contents and nobody has said anything about that.

Mr. Danahar: All right.

The Court: Objection sustained. They are of the same size and shape. It may be admitted without any concession as to the weight, if you limit it that way.

Mr. Danahar: I have no objection on that basis.

The Court: It is admitted on that basis, but not as to the weight, but as to the same size and shape. As to weight, I suppose there would have to be some proof.

(Plaintiff's Exhibit 5 for identification received in evidence.)

Mr. Friedman: Perhaps I better consult with you on this.

The Court: Well, some of these consultations are not necessary.

Mr. Friedman: I can represent to the Court that I personally ordered a 100-pound drum of Brickram cement from the General Refractories Company, which was delivered here this morning.

The Court: Now do you know that the other was the same?

Mr. Friedman: It is conceded that the other was 100 pounds.

Mr. Danahar: That is true.

The Court: Do you want to take his representation?

Mr. Danahar: I will take his representation, your Honor, but I still want to know whether that weighs 100 pounds. It might be 150 pounds for all we know. The only true way to find out is to weigh the thing.

Mr. Friedman: Some time before the trial is over we can get some technique of weighing it.

fol. 53 Mr. Danahar: I accept Mr. Friedman's statement that he ordered this and that they told him it was 100 pounds but what it actually is I do not know.

The Court: Well, that is up to you to prove the weight.

Mr. Friedman: We will try to do it some time before the trial is over.

The Court: All right. Is there any more direct examination?

Mr. Friedman: I have no further questions at this time.

* * * * * * *

[fol. 73]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 101-310

ANDRES SAN MARTIN, Plaintiff,

against

UNITED STATES LINES COMPANY, Defendant and Third Party Plaintiff,

against

UNITED STATES OF AMERICA, Third Party Defendant.

FINAL JUDGMENT—August 30, 1960

The above entitled action having come on for trial before Honorable Richard H. Levet and a jury, and the issues with respect to plaintiff's claim for maintenance and cure reserved for trial by the Court without a jury, and the third party complaint having been dismissed at the close of the evidence in the jury trial by consent, without costs, and the jury having rendered a special verdict with respect to plaintiff's claims for negligence and unseaworthiness in answer to special interrogatories, as follows:

Special Verdict

1. Was the order of the defendant, under all the facts and circumstances thereof, to bring the drum of cement up the gangway on November 5, 1954 a negligent order? No.

[fol. 74] 2. Was the SS American Reporter unseaworthy? No.

If your answer to either No. 1 or No. 2 is in the affirmative, answer No. 3. If they are in the negative, your verdict is for the defendant.

3. Was the plaintiff injured either as a result of obedience to said order or the unseaworthiness of the vessel?

4. (a) If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, to what award, if any, is the plaintiff entitled for pain, suffering and disability from the date of the accident to the present time as a result of injuries referred to in No. 3?

(b) To what award, if any, is the plaintiff entitled for lost earnings from December 15, 1954 to the present time as a result of injuries referred to in No. 3?

Note: The net earnings after taxes of the plaintiff are to be considered here.

(c) To what award, if any is the plaintiff entitled for pain, suffering and disability which he allegedly will endure in the future as a result of the injuries referred to in No. 3 and for any future reasonable medical expenses which he will incur as a result of the injuries referred to in No. 3?

(d) For how many years from today forward do you estimate that plaintiff would have been able to work but for the injuries referred to in No. 3 and despite other physical handicaps?

(e) What, if anything, is the annual amount of wages which plaintiff would have earned from today forward but for the injuries referred to in No. 3 and despite other physical handicaps?

[fol. 75] Note: The net earnings after taxes of the plaintiff are to be considered here.

(f) What, if anything, is the annual amount of future wages which plaintiff may reasonably be expected to earn from today forward despite the injuries referred to in No. 3 and despite other physical conditions from which he may suffer?

(g) Deducting the sum arrived at in answer to (f) above from the sum arrived at in answer to (e) above, what, if anything is the annual amount of earnings which will be lost to plaintiff in future years as a result of the injuries referred to in No. 3?

5. If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, did the plaintiff by any negli-

gent conduct contribute in any degree to the injuries referred to in No. 3?

6. If your answer to No. 5 is in the affirmative, to what extent did plaintiff's negligent conduct so contribute to the injuries referred to in No. 3?

Note: In answering this question state your answer as a percentage.

And the Court having directed judgment with respect to the said claims for negligence and unseaworthiness in accordance with said special verdict

And the Court having filed its opinion, findings of fact and conclusions of law with respect to plaintiff's claim for maintenance and cure, dated June 29, 1960, granting judgment for the plaintiff in the sum of $224 with interest on each day's allowance, such interest in each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, it is

[fol. 76] Ordered and Adjudged that plaintiff's claims for personal injuries based upon negligence and unseaworthiness, be and are hereby dismissed, with prejudice, and without costs, and it is further

Ordered and Adjudged that plaintiff recover of and from the defendant, for maintenance and cure, the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, without costs, and it is further

Ordered and Adjudged that the third party complaint be dismissed, without costs.

Dated: New York, New York,
Aug. 30, 1960.

Richard H. Levet, U. S. D. J.

Rec'd in Clerk's office 9/6/60.

Judgment Entered this 6 day of September 1960.

Herbert A. Charlson, Clerk.

[fol. 77]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT NEW YORK

Civil 101-310

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ANDRES SAN MARTIN, Plaintiff,

against

UNITED STATES LINES COMPANY, Defendant.

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OPINION BY LEVET, D. J.—June 30, 1960

Appearances:

Benjamin Glickman, Attorney for Plaintiff, 305 Broadway, New York, N. Y.

Jacob Rassner, Counsel for Plaintiff, 15 Park Row, New York, N. Y.; Theodore H. Friedman, of Counsel.

LEVET, D. J.:

The first cause of action herein was an action under the Jones Act (46 USCA 688), based upon the alleged negligence of the defendant and upon the alleged unseaworthiness of the vessel. This issue was tried to the court and jury and a verdict thereon rendered for the defendant.

The second cause of action, for maintenance and cure, was tried before the court. All relevant testimony taken before the jury and subsequently before the court has been considered.

After hearing the proofs and evidence of the parties, and after examining the pleadings, exhibits, briefs and requests to find submitted, I find as follows:

[fol. 78]

FINDINGS OF FACT

1. Plaintiff, a seaman, born December 31, 1897, was employed aboard the defendant's vessel, the SS American Reporter, as a crew member in the capacity of a wiper from on or about November 3, 1953 to December 15, 1954.

2. The defendant, United States Lines Company, is a corporation doing business within the State of New York. Through the aforesaid period of employment said defendant owned, operated, managed and controlled the said SS American Reporter.

3. Prior to said employment by defendant, plaintiff was given a pre-employment physical examination by defendant's physicism and was accepted for employment. The ordinary pre-sign-on examination would not have revealed the aneurysm hereinafter referred to. A chest x-ray would have been required.

4. In 1945, plantiff was told that he had contracted syphilis. This went untreated for a number of years and had produced an aneurysm of the ascending aorta of plaintiff's heart and heart failure for which he was subsequently treated by a private doctor, Dr. Frank Spindler, from March 2, 1952 to September 18, 1953. Dr. Spindler informed plaintiff of his said ailments and indicated he might work at his calling.

5. The plaintiff at no time disclosed to defendant the fact that he had syphilis or that syphilis had produced an aneurysm of the ascending aorta and heart failure.

6. On December 5, 1954, while the ship was at sea, the plaintiff reported to the purser complaining of pains in his lower back and left leg, which condition plaintiff said originated on November 4, 1954; as a result the plaintiff [fol. 79] became disabled and unfit for duty aboard said vessel on December 13, 1954. On December 15, 1954, after further complaints, plaintiff requested a hospital slip, and a master's certificate was that day issued to him to obtain "treatments of rheumatic pains in leg."

7. While plaintiff served on the SS American Reporter, there were no manifestations of his cardio-vascular condition or any complaints from him relating thereto; his sole purpose in signing off the vessel on December 15, 1954 was to obtain treatment for his leg.

8. Plaintiff was treated as an out-patient for said complaints and pains at the United States Public Health Service Out-Patient Clinic at 67 Hudson Street, New York,

N. Y., from December 20, 1954 to January 12, 1955, and as an in-patient at the United States Public Health Service Hospital at Stapleton, Staten Island, New York, from January 12, 1955 to March 1, 1955. Here, the sole complaint of plaintiff was "pain in the muscle of the left calf for 2 months."

9. During the course of these treatments at the Marine Hospital at Hudson & Jay Streets, New York, N. Y., the aneurysm of the ascending aorta was noted.

10. There is no evidence that plaintiff's condition relating to his cardio-vascular system, i.e., the enlargement of the cardiac vessels, became disabling during the period of plaintiff's service aboard defendant's vessel or that the service of plaintiff aboard such vessel aggravated such condition.

11. The plaintiff was admitted to the United States Marine Hospital at Stapleton, Staten Island on January 12, 1955 and he remained there until discharged on March 1, 1955. The diagnosis there was (1) aneurysm of aorta due to [fol. 80] arteriosclerosis; (2) herniation of nucleus pulposus due to unknown cause; (3) syphilis of undiagnosed site. The prognosis was guarded and the disability was stated "not fit for duty indefinitely." The plaintiff denied chest pain and upon admission to the Marine Hospital made no complaint with respect to his cardio-vascular condition. He was held not to be a candidate for surgery (as to the herniation) because of the aneurysm.

12. The plaintiff's condition relating to his back and left leg, i.e., the herniation of the nucleus pulposus at the L5-S1 level at the left, arose while plaintiff was in the service of the defendant's vessel and on or about November 4, 1954.

13. At the time of his discharge from the Marine Hospital on March 1, 1955, plaintiff had reached the point of maximum possible cure as to his back condition. There was no further treatment which could have improved his condition.

14. On March 1, 1955, the plaintiff had reached the maximum cure as to the cardio-vascular condition; and on October 30, 1957 and April 28, 1960 was not suffering from congestive heart failure. (See testimony of Dr. Eugene Clark.)

15. The plaintiff has not received any medical treatment for his back or cardio-vascular conditions since his discharge from the Marine Hospital at Stapleton, Staten Island, New York on March 1, 1955.

16. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December 15, 1954 to January 12, 1955 (28 days) for a total of $224.00.

[fol. 81] Discussion

The testimony of the principal witnesses is as follows:

Dr. Irving Mauer, an orthopedic surgeon of considerable standing, testified upon behalf of plaintiff.

He testified that when he examined the plaintiff on May 2, 1960, he found the following conditions: Limitation of back motion; limitation of straight leg raising; weakness; absence of the left ankle jerk; weakness of the left extensor halluois longus with hypasthesia over the lateral aspect of the left leg extending to the lateral aspect of the foot. He also found varicosities affecting both lower extremities; atrophy of the left thigh and atrophy of the left calf; tenderness along the spinous and interspinous ligaments.

Mr. Mauer stated that in his opinion the plaintiff had not reached the maximum cure with respect to his back.

The treatment which he recommended is the so-called "conservative treatment" consisting of (1) wearing a brace; (2) physiotherapy; and (3) injection of vitamin B-12. These treatments would cover periods of from one year to 18 months, and apparently would cost between $1,420 and $2,120. During the treatment recommended, the exercise tolerance would have to be built up by reason of the cardiac situation. This treatment, in the opinion of Dr. Mauer, would partially restore the plaintiff to a condition in which he might work at non-arduous tasks such

as an elevator operator, an assembler of parts or a job conducted in a sedentary manner.

Dr. Mauer reiterated the above opinion in spite of the fact that the hospital records of the Marine Hospital indicated that on March 1, 1955 the patient, San Martin, had received maximum hospital benefits and in spite of the further fact that Dr. Mauer was a member of the staff of that hospital at that time, although it appears [fol. 82] that he was not one of the reporting examiners as to this particular patient.

Dr. Irwin Balensweig, who is an orthopedist and traumatic surgeon, testified in substance as follows:

He examined the plaintiff on June 25, 1956 and on May 13 1960 and he stated that he had reviewed the hospital records and taken certain X rays.

The hospital records at the Marine Hospital indicated that at the time of discharge San Martin had reached maximum hospital benefits, and Dr. Balensweig said that in his opinion also San Martin had reached maximum medical treatment benefits at that time. He indicated that there would be no benefit from further therapy treatments now; that a brace would not correct the herniated disc, if there were one, and that the injection of vitamin B 12 were not used in the treatment of backs. Dr. Balensweig concluded by stating that there was nothing to do for San Martin except that San Martin should adapt himself to his complaints.

Dr. Frank Spindler, an internist and general practitioner, testified that he treated the plaintiff some 82 times from March 4, 1952 to September 18, 1953, treating both a syphilitic condition and a heart condition. He talked to the plaintiff about his heart condition and advised hospitalization.

However, on or about September 18, 1953, Dr. Spindler examined the plaintiff, who then complained only of nervousness. Dr. Spindler then gave it as his prognosis that the plaintiff could work.

Dr. Spindler examined the plaintiff again on May 27, 1960. "I again took his blood pressure; it was 150 systolic

over 90 diastolic. I listened to the heart. He had an enlarged heart, regular beat, 100 per minute. He had an aortic systolic murmur and an aortic diastolic murmur. The apex of the heart was displaced to the sixth interspace about 4 centimeters to the left of the nipple. I again [fol. 83] fluoroscoped him and he demonstrated this time the enlargement of the heart, but with two densities, the density I described originally to the right ventricle and another density on the arch of the aorta, which, without doubt, is an aneurysm. I weighed him. I gave him some treatment."

Dr. Spindler testified that San Martin had not reached the maximum cure for the cardio-vascular condition and he recommended the following treatment: Treatment would consist of what Dr. Spindler called "compensation," by the removal of the fluid from the tissues of the body, either from the base of the lung or the extremities, upper or lower, or at any other soft tissue parts of the body. The method used is the standard mercurial diuretics together with new agents found within the last year. This treatment, the doctor said, would require from three to five years. In the beginning the treatment would be weekly for about two months and then after that monthly. The minimum time would be three years. The cost, he said, would be $10.00 per treatment, including medication.

Dr. Eugene Clark, a specialist in heart and cardio-vascular matters, testified that he examined the plaintiff on October 30, 1957 and on April 27, 1960. He also made X-rays, cardiographs, took blood tests and made a urine analysis. He said the aneurysm was the size of a fist and would have required a development of ten years before December 1954 and that the cause of this aneurysm was syphilis. He also said that the ordinary pre-sign-on examination would not have revealed the aneurysm; that a chest X-ray was required to discover this.

Dr. Clark testified that there was no indication at the time of the Hudson & Jay Street Hospital clinical records, December 20, 1954 to January 6, 1955, or the Marine Hospital record or on his examination of October 30, 1957 or on his last examination on April 27, 1960 that the plaintiff was suffering from congestive heart failure.

[fol. 84] DR. HYMAN ARENBERG, who is a specialist in internal medicine and cardiology, testified for the plaintiff.

Dr. Arenberg said that he had examined plaintiff on June 23, 1960 and that, in his opinion, plaintiff was now suffering from congestive heart failure; that he has an aneurysm of the arch of the aorta of long standing.

The doctor testified that treatment of the plaintiff should be administered to diminish the fluid in his body in order to decrease the size of the heart, diminish the congestion in the lungs and diminish the extent of the peripheral edema that plaintiff has in his legs. This treatment, accompanied by a low sodium diet and the loss of 25 or 30 pounds and with the taking of digitalis to reduce the heart rate and to give a greater efficiency of cardiac contraction, along with diuretics, would improve the plaintiff considerably. He might then be able to work as a watchman, although not to go back as a seaman. The minimum time of such treatment would be six months. The doctor was not too definite about the cost, although there was some indication that this would involve two treatments a week at about $3.00, or perhaps a total of $100.00.

The Court of Appeals for this circuit has recently commented on a seaman's right to maintenance and cure as follows:

> "'[T]he vitality of a seaman's right to maintenance and cure has not diminished through the years.' Mitchell v. Trawler Racer, Inc., supra, at — [28 U. S. L. Week 4293, decided May 17, 1960]. It has become established that the obligation of the shipowner attaches as a result of the relationship of employing without any regard for the form of the contract or the will of the contracting parties. Cortes v. Baltimore Insular Line, 1932, 287 U. S. 367, 372. The rights of the seaman are neither conditioned on fault on the part of the [fol. 85] shipowner nor on the absence of fault on his part. Farrell v. United States, 1949, 336 U. S. 511. Nor must the injury or illness be in any way causally connected with shipboard duties. Farrell v. United States, supra. The obligation to provide maintenance and cure has been expanded so far that two of the foremost admiralty scholars have concluded that 'With

> the exception of borderline cases on misconduct * * * [t]he remedy has become absolute.' Gilmore and Black, The Law of Admiralty (1957) 261." Bartholomew v. Universe Tankships, Inc., 2 Cir., No. 25989, decided June 21, 1960.

Of course, this responsibility of the shipowner to provide maintenance and cure extends only until the point of maximum recovery. Calmar SS Corp. v. Taylor, 1938, 303 U. S. 525; Farrell v. United States, 1949, 336 U. S. 511.

As with other well-defined rules of law, difficulties arise in the application to a given factual situation. The problem present here stems from the fact that the plaintiff has two distinct physical disabilities.

As heretofore found, the heart condition pre-existed employment and did not manifest itself during the employment. The responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen *becoming ill or injured* during the period of their service. See Aguilar v. Standard Oil Co., 1942, 318 U. S. 724, 730, including Note 6, p. 730.

Cases cited by the plaintiff are not applicable. They involve situations where a pre-existing condition either becomes aggravated or manifests itself during service on the vessel or are cases based upon a ship-incurred ailment. See Ahmed v. United States, 2 Cir., 1949, 177 F. 2d 898; United States v. Robinson, 5 Cir., 1949, 170 F. 2d 578; Hern [fol. 86] v. Moran Towing and Transportation Co., 2 Cir., 1943, 138 F. 2d 900; Rex v. Colonial Nav. Co., 2 Cir., 1941, 116 F. 2d 580; Lindgren v. Shepard S. S. Co., 2 Cir., 1940, 108 F. 2d 806.

In any event, I am convinced that the heart condition was incurable on March 1, 1955 when the plaintiff was discharged from the Marine Hospital. When meaningful hopes for recovery end, the shipowner's liability ends. If the disease is incurable the shipowner has no further liability even though the patient may require additional treatment to restrain degeneracy or relieve pain. Desmond v. United States, 2 Cir., 1954, 217 F. 2d 948.

I am impressed by the testimony of Dr. Eugene Clark, who examined the plaintiff on October 30, 1957 and on

April 27, 1960 and examined the records of the Marine Hospital. Dr. Clark found no indication of a congestive heart failure. The "compensation" treatment described by Dr. Spindler would not improve the essential heart condition of the plaintiff—the enlargement of the cardiac vessels.

The back condition of the plaintiff—the herniation of the nucleus pulposus—arose while plaintiff was in the service of defendant's vessel. The shipowner was obligated to furnish maintenance and cure until such time as the disease was cured or recognized as incurable. This duty does not extend beyond a fair time after the voyage in which to effect such improvement as the seaman's condition can reasonably may be expected to result from nursing care and medical treatment. Calmar SS Corp. v. Taylor, 1938, 303 U. S. 525, 530.

In this case, the aneurysm of the aorta due to arteriosclerosis made surgical intervention to cure the herniation of the nucleus pulposus impossible. When the plaintiff was released from the Marine Hospital on March 1, 1955 maximum hospital benefit was indicated. It is the contention [fol. 87] of the plaintiff that "conservative treatment should have been given which would have rehabilitated from to a point where he could have obtained sedentary employment. At issue, therefore, is the meaning of the word "cure."

In The Bunker No. 2, 2 Cir., 1917, 241 Fed. 831, 835, "cure" was defined as follows:

> "* * * We agree with the remarks in The Mars, supra (49 Fed. 729, 731 C.C.A. 435 (C.C.A. 3d)), that:
>
> "'The word "cure" is used in its original meaning of care, and means proper care of the injured seaman, and not a positive cure, which may be impossible.'
>
> "Furthermore, 'cure' has been held to signify:
>
> "'The ordinary medical assistance and treatment in case of injury or acute disease, for a reasonable time. The ship is not bound to pay for the sailor's medication for the cure of a chronic disorder for an indefinite length of time.' The Ella S. Thayer (D. C.) 40 Fed. 904.
>
> "Nor does the liability of the ship extend beyond—'expense of effecting a cure by ordinary medical means.

> This does not include extraordinary medical treatment or treatment after cure effected as completely as possible in a particular case.' The C. S. Holmes, supra [(D. C.) 209 Fed. 970]."

In *Carlsson* v. *United States*, 2 Cir., 1958, 252 F. 2d 352, the court noted that the right to maintenance and cure may continue to exist until maximum *rehabilitation* has been obtained. However, in *Buch* v. *United States*, 2 Cir., 1955, 220 F. 2d 165, an award based upon a rehabilitation program was reversed when the appellate court found insufficient evidence to demonstrate the curative nature of the treatment. The curative nature of the treatment was [fol. 88] also emphasized in *Bradt* v. *United States*, 2 Cir., 1955, 221 F. 2d 325.

Maximum cure is reached when no further improvement in the seamen's condition is to be expected. *Wilson* v. *United States*, 2 Cir., 1956, 229 F. 2d 277; *Kosluski* v. *United States*, 2 Cir., 1953, 208 F. 2d 957.

No further improvement in plaintiff's back condition could have resulted from any treatment after March 1, 1955. The treatment described by Dr. Mauer is not of a sufficiently curative nature to be classified as cure. Dr. Mauer's conservative treatment consists of the wearing of a brace, physiotherapy and vitamin B-12 injections. This treatment appears to be in the nature of an attempt to restrain degeneracy or relieve pain rather than curative. See *Desmond* v. *United States*, 2 Cir., 1954, 217 F. 2d 948.

In addition, Dr. Mauer examined the plaintiff on May 2, 1960. It is not unreasonable to assume that some of the conditions found on that date, namely the general weakness and the atrophy of the left thigh and left calf, were directly related to the five years spent in inactivity without medical care since March 1, 1955. There is no assurance that the so-called "conservative treatment," which in essence is exercise and the wearing of a brace, was indicated by his condition on March 1, 1955.

Dr. Balensweig, who examined the plaintiff on June 25, 1956 and who examined the hospital records at that time, was of the opinion that the plaintiff had reached maximum cure at the time of the discharge from the hospital.

There is no evidence here that subsequent to March 1, 1955 the plaintiff ever sought medical treatment or incurred medical expense. See *Carlsson* v. *United States*, 2 Cir., 1958, 252 F. 2d 352, 353. This is not to indicate that this failure to seek medical attention would warrant a forfeiture of his right to maintenance and cure. See *Gardner* v. *Sinclair Refining Co.*, 3 Cir., 1955, 227 F. 2d 958.

[fol. 89] But the failure of the plaintiff to seek such relatively simple treatment for over five years raises doubt as to the validity of the proposed cure. See *Buck* v. *United States*, 2 Cir., 1955, 220 F. 2d 165, wherein the court stated: "Since the libelant has shown no inclination to date to undertake this program, we cannot say that its curative nature was sufficiently demonstrated" (p. 166).

The Plaintiff reached maximum cure on March 1, 1955 when all meaningful hopes for recovery ended and no further improvement in his condition could be expected. He is entitled to maintenance from December 15, 1954 to January 12, 1955 in the amount of $224, plus interest as hereinafter designated.

## Conclusions of Law

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The defendant has the duty to provide maintenance and cure to any seaman injured or falling ill in the service of the ship.

3. The plaintiff suffered a back injury while in the service of the ship and also suffered from a cardio-vascular condition.

4. The plaintiff reached the point of maximum recovery for both disabilities on March 1, 1955, the date of his discharge from the United States Public Health Service Hospital at Stapleton, Staten Island, New York and no further improvement in his condition could be expected after that date.

[fol. 90] 5. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December

15, 1954, the date of the termination of the voyage of defendant's vessel, to January 12, 1955, the date of his admission to the United States Public Health Service Hospital, a total of 28 days, for a total amount of $224, plus interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Let a decree be entered in accordance herewith in favor of the libellant for the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Richard H. Levet, United States District Judge.

Dated: New York, N. Y.
June 29, 1960.

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[fol. 106a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 26716

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ANDRES SAN MARTIN, Plaintiff-Appellant,

—against—

UNITED STATES LINES COMPANY, Defendant-Appellee and Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA, Third-Party Defendant.

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STIPULATION AND ORDER SUBSTITUTING PARTY APPELLANT

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto:

1. That the Public Administrator of the County of New York, Thomas I. Fitzgerald, be substituted as party plaintiff-appellant in place of Andres San Martin, now deceased.

2. That the caption herein hereafter be as follows:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MALTIN, deceased, Plaintiff-Appellant,

—against—

UNITED STATES LINES COMPANY, Defendant-Appellee and Third Party Plaintiff,

—against—

UNITED STATES OF AMERICA, Third Party Defendant.

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[fol. 106b]

3. That Benjamin Glickman appears herein as attorney for the substituted party plaintiff-appellant, and Jacob Rassner appears herein as counsel for the substituted party plaintiff-appellant.

4. That the time to file the printed brief and appendix on behalf of the plaintiff-appellant be extended to November 15, 1961, and the plaintiff-appellant agrees not to file said brief and appendix before November 10, 1961.

Dated: New York, N. Y.
October 6, 1961.

Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased.

Benjamin Glickman, Attorney for Plaintiff-Appellant.

Jacob Rassner, Of Counsel for Plaintiff-Appellant.

Kirlin, Campbell & Keating, Attorneys for Defendant-Appellee.

So Ordered:

October 10, 1961.

Charles E. Clark, U.S.C.J.

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[fol. 107]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 194—September Term, 1961

Docket No. 26716

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THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased, Plaintiff-Appellant,

—v.—

UNITED STATES LINES COMPANY, Defendant.

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OPINION—June 29, 1962

Before: Lumbard, Chief Judge, Clark, Waterman, Friendly, Smith, Kaufman, Hays and Marshall, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Richard H. Levet, Judge, in a seaman's action for damages under the Jones Act and for maintenance and cure, dismissing the Jones Act claim on the basis of a special verdict negating negligence and unseaworthiness, and awarding $224 for maintenance and cure. Affirmed.

[fol. 108] Theodore H. Friedman (Benjamin Glickman, Jacob Rassner), New York, New York, for Plaintiff-Appellant.

Matthew L. Danahar (Kirlin, Campbell & Keating), New York, New York (John A. Dowd of Counsel), for Defendant.

FRIENDLY, Circuit Judge:

This action against United States Lines Company, begun in the Southern District of New York by Andres San Martin, a seaman employed on defendant's vessel, the SS. American Reporter, has been continued, on his death after trial, by the Public Administrator of New York County. The complaint, filed in 1955 and brought to trial in 1960, alleged two causes of action. The first, relying specifically upon the Jones Act, 46 U. S. C. 688, asserted that by reason of the unseaworthiness of the American Reporter and defendant's negligence, plaintiff had been caused to twist and strain his back while assigned to carry barrels of cement up the ship's gangway on November 6, 1954, and that defendant was further negligent "in failing to provide the plaintiff with timely, adequate, proper and competent medical care and attention and maintenance and cure, thereby aggravating his condition," with total damages of $75,000. The second was for maintenance and cure in the sum of $10,000.

Plaintiff's citizenship was not alleged. Defendant was alleged to be, in paragraph First, "a domestic corporation organized and existing under and by virtue of the Laws of the State of New York" and, in paragraph Second, "a foreign corporation duly licensed to do business within the State of New York." Paragraph Third alleged that "the defendant had an office for the transaction of business in [fol. 109] the Borough of Manhattan, City and State of New York." Compliance with F. R. Civ. Proc. 8(a)(1), demanding "a short and plain statement of the grounds upon which the court's jurisdiction depends," was evidently intended to be met by paragraph Ninth: "Plaintiff elects to maintain this action under the provisions of Section 33 of the Merchant Seamen's Act as of June 15, 1920, C. 250 41

Stat. 1007 otherwise known as the Jones Act." There was endorsed on the complaint "Plaintiff Demands a Jury Trial." In its answer defendant denied being a New York corporation and admitted being a foreign corporation and having a New York office.

Before a jury was chosen, Judge Levet directed that the claim for maintenance and cure be tried to the court only; counsel for plaintiff excepted. On the following morning, discussion of this was resumed in the robing room before the taking of testimony began. Plaintiff's counsel stated that jury trial of maintenance and cure "is a matter of choice for the District Court," and also that "The plaintiff is entitled to a jury on this action which is properly before this Court on a common-law basis"—without further amplification save for reference to "the authority of Jenkins v. Walker" [presumably *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957)], and "the discussion of that case by the Supreme Court in Romero v. International Terminal." The judge adhered to his ruling "that in this court, in the Second Circuit, it is permissible and authorized to try maintenance and cure to the Court."

At the conclusion of the trial Judge Levet submitted to the jury six questions, relating respectively to negligence, unseaworthiness, resulting injury, amount of damages, contributory negligence, and its degree. The jury gave negative answers to the first two questions; consequently, in accordance with the judge's direction, it did not answer the last four. Appellant makes no complaint as to the form [fol. 110] of the questions or the judge's charge; he does complain about certain rulings excluding evidence, which we will consider below.

In an opinion later filed, the judge found that San Martin had incurred a back injury while in the service of the ship and also suffered from a cardio-vascular condition due in part to untreated syphilis; that he had reached the point of maximum recovery for both disabilities on March 1, 1955, when he was discharged from a United States Public Health Service Hospital; and that liability for maintenance and cure was thus limited to the period, 28 days, before he entered the hospital, to wit, $224. Although appellant criticizes the judge's determination with respect to main-

tenance and cure, his principal complaint on that aspect of the case is that the judge should not have made any determination but ought to have left the issue to the jury; as to the criticisms apart from this principal complaint, it suffices to say that the judge's determination was not in any view clearly erroneous.

Because the analysis of the right to jury trial of the claim for maintenance and cure made by a majority of the panel conflicted with a recent dictum on the subject by this Court, see Mr. Justice Frankfurter in *Western Pacific Railroad* case, 345 U. S. 247, 270 (1953), and also because the problem constantly recurs in the district courts, we determined that the case should be considered *in banc*, upon the briefs and argument already had. This consideration has produced a variety of views, with none commanding a majority. It will thus be convenient to dispose of the issues relating to the trial of the personal injury claim, which none of us would have thought appropriate for *in banc* consideration if standing alone, before proceeding to the question of jury trial of the claim for maintenance and cure.

[fol. 111]

## I.

Certain of appellant's objections to rulings excluding evidence on his personal injury claim, relating to San Martin's explanation of his failure to make earlier complaint about his injury, his colloquy with physicians at the Public Health Service clinics and hospital, and a report by a physician who testified for him, are rendered moot by the special verdict negating unseaworthiness or negligence; we need concern ourselves only with the exclusion of evidence relating to the accident itself.

Appellant complaint that San Martin was not allowed, on direct examination, to testify that he had objected to carrying the two heavy barrels of cement up the gangway. Although we can see no sufficient reason for this ruling, it was not prejudicial since counsel returned to the subject on redirect and, without objection, elicited testimony that San Martin had told his boss, Manzo, the mission was "too dangerous" and the boss had answered "You have to do

anyway. Appellant next urges that San Martin was not allowed to testify why he moved from side to side while ascending the gangway. Again the ruling seems needlessly severe but not, as matters developed, prejudicial. The evident purpose of the testimony was to show the gangway was unstable. San Martin was allowed to testify that he moved and that the gangway moved; the physical layout of the gangway was in evidence; and the judge stated in his charge, without exception from plaintiff's counsel, "As appears by the stipulation read to you this morning, it is agreed that the nature and position of the gangway does not enter into the disposition of this case."

Finally, and most important, appellant objects that one of San Martin's fellow-employees, Murrell, was not allowed to answer a question as to conversations with Manzo about bringing aboard engine stores within a month before the [fol. 112] accident, even after it had been shown that the weights of the stores on the prior occasion were less than the 100 pounds San Martin was ordered to carry on the day of the alleged injury. When the judge inquired as to the pertinency of this testimony, counsel answered, not very informatively, "Prior and similar loading procedure," to which the court responded "It is too remote." Assuming in appellant's favor, perhaps somewhat generously, that counsel's remark was an offer to prove that Murrell had complained to Manzo about the manual loading of lesser weights, the evidence should have been admitted. Knowledge of danger is relevant to a determination of negligence, the *Nitro-Glycerin* case, 82 U. S. (15 Wall.) 524, 536-537 (1873), and evidence that such knowledge was gained through an express communication is admissible. 2 Wigmore, Evidence (3d ed. 1940) §245; *New York Life Ins. Co.* v. *Seighman*, 140 F. 2d 930, 932-933 (6 Cir. 1944); *Evans* v. *Pennsylvania R.R.*, 255 F. 2d 205, 209-210 (3 Cir. 1958); *Smith* v. *Whittier*, 95 Cal. 279, 30 Pac. 529 (1892); *Jenkins* v. *Reichert*, 125 Conn. 258, 5 A. 2d 6 (1939); *Dowling* v. *L. H. Shattuck, Inc.*, 91 N. H. 234, 17 A. 2d 529 (1941); *Killian* v. *Andrews Mfg. Co.*, 187 N. C. 810, 123 S. E. 86 (1924). However, the probative effect of the excluded evidence would not have been great. The case differs significantly from those cited where the dangers were defects

in machinery or property, things which the defendant might not notice on his own inspection and, in many instances, so technical that he might not appreciate the danger if he did; in such cases proof of notice is highly critical since there may be no basis for finding the defendant negligent without it. Here the issue related to the safety of the carrying of certain weights by men rather than machines. The jury had the evidence of experts called by both parties, San Martin's own testimony he had told Manzo the procedure was "too dangerous," and its own common sense; if [fol. 113] the jury was not persuaded of negligence on that evidence, it hardly would have been by the addition of testimony that a fellow employee had complained about the procedure on a previous occasion. In *Dowling* v. *L. H. Shattuck, Inc.*, *supra*, where the evidence of a prior communication, held properly admitted, was far more important, the court implied that the trial judge would also have been upheld if he had excluded it. In view of this and the recognized discretion of trial judges to exclude for remoteness, see, e.g., *Duvall* v. *Birden*, 124 Conn. 43, 198 Atl. 255 (1938); *Hutteball* v. *Montgomery*, 187 Wash. 516, 60 P. 2d 679 (1936), reversal with respect to the personal injury claim is not called for, even though a more liberal concept of relevancy would have conformed better with modern trends in the law of evidence.

## II.

We can also unanimously dispose of one argument of appellant with respect to the denial of jury trial, namely, that the judge erroneously reserved for himself plaintiff's claim for damages from negligent failure to furnish care or maintenance and cure. Appellee does not dispute that such a claim is conferred by the Jones Act, with the attendant right to trial by jury, *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932); *Vaughan* v. *Atkinson*, —— U. S. —— (1962). However, although the complaint alleged such a claim, no evidence was adduced to support it, and plaintiff's counsel made no request that any question on this subject be included in those propounded to the jury. We cannot assume the judge would have refused to submit such a question if the evidence had warranted.

## III.

Appellant's contention that San Martin was entitled to a jury trial on his claim for maintenance and cure rests on [fol. 114] two alternative grounds: (1) that San Martin had invoked the court's diversity of citizenship jurisdiction, 28 U. S. C. §1332; and (2) that he was entitled to a jury trial irrespective of this because his claim for maintenance and cure was "pendent" to his claim under the Jones Act. This section of the opinion deals with the first ground.

There are many statements by commentators that a seaman properly invoking the jurisdiction of the district court because of diverse citizenship has a right to a jury trial of a claim for maintenance and cure, whether this is asserted independently or joined with other claims. See, e.g., Benedict, American Admiralty (1st ed. 1850 & 2d ed. 1870), p. 107; 1 *id.* (6th ed. 1940), p. 36; 5 Moore, Federal Practice (1951), p. 284; 71 Harv. L. Rev. 1359, 1360 (1958); Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1, 5 (1959); The Supreme Court, 1958 Term, 73 Harv. L. Rev. 126, 139 (1959). The reasoning stems from §9 of the Judiciary Act of 1789, 1 Stat. 77, carried forward into 28 U. S. C. §1333(1), wherein the grant to the district courts of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" was qualified with the famous reservation, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The common law is competent to give a common law remedy for breach of the obligation, created by the general maritime law, to pay maintenance and cure, namely, a money judgment against the operator of the ship. The saving clause thus permits a suit to that end in a state court, where jury trial may usually be had, see *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185 (1871); *Norton* v. *Switzer*, 93 U. S. 355, 356 (1876); *Garrett* v. [fol. 115] *Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). Hence, it is reasoned, if such a suit were removed to the

[1] Subject, however, to a *caveat*, "Congress *probably* intended that if he sued in the federal court (as he might if there were diversity of citizenship) he should have the right to a jury trial." [Emphasis supplied.] Perhaps the "*probably*" was due to the considerations outlined in fn. 6.

Federal court because of diversity or brought there on that ground, the saving clause requires jury trial.

In view of the plausibility of the argument and the unanimity of the commentators, it is surprising that the first case we have found that specifically decided in favor of a jury trial in a Federal diversity suit on a maritime claim (in that case personal injury caused by unseaworthiness) is *Philadelphia & Reading R. Co.* v. *Berg*, 274 F. 534, 539 (3 Cir. 1921), affirming 266 F. 591 (E. D. Pa. 1920), cert. denied, 257 U. S. 638 (1921). The Court of Appeals noted that "The Supreme Court of the United States has not passed upon this specific question, but the right to try on the law site [sic] of the District Court a cause arising in admiralty has been recognized in the Circuit Court of Appeals for the Second Circuit," citing *John A. Roebling's Sons Co.* v. *Erickson*, 261 F. 986 (2 Cir. 1919), cert. denied, 252 U. S. 585 (1920); *Hanrahan* v. *Pacific Transport Co.*, 262 F. 951 (2 Cir. 1919), cert. denied, 252 U. S. 579 (1920), and *Storgård* v. *France & Canada S.S. Corp.*, 263 F. 545 (2 Cir.), cert. denied, 252 U. S. 585 (1920). Examination of the papers on appeal in those suits, all for accidents antedating the Jones Act, shows that diversity did exist and maritime claims (unseaworthiness in all three cases and also maintenance and cure in the first) were submitted to the jury; however, such submission was not disputed, and the point is not discussed.[3] Since the *Berg* case a considerable number of opinions have recognized, either by dictum or by decision, the right to jury trial of a claim [fol. 116] for maintenance and cure and other maritime claims of seamen filed on the "law side" of the Federal court on the ground of diversity: *Thornes* v. *Socony Vacuum Oil Co.*, 38 F. Supp. 616 (S. D. N. Y. 1940); *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890 (D. Mass. 1947) [dictum]; *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950) [dictum]; *Watlack* v. *North Atlantic*

[2] The accident quite clearly antedated the Jones Act, which became effective June 5, 1920. 41 Stat. 1007.

[3] The Third Circuit's citation of the Second Circuit cases was likely due to the fact that plaintiff's counsel in all four cases was the late Silas B. Axtell.

*& Gulf SS. Co., Inc.*, 107 F. Supp. 162 (E. D. Pa. 1952), aff'd, 202 F. 2d 280 (3 Cir. 1953); *Williams* v. *Tide Water Associated Oil Co.*, 227 F. 2d 791 (9 Cir. 1955), cert. denied, 350 U. S. 960 (1956); *Troupe* v. *Chicago, D. and G. Bay Transit Co.*, 234 F. 2d 253, 258 (2 Cir. 1956); *Morrow* v. *Point Towing Co.*, 187 F. Supp. 168 (W. D. Pa. 1960).[4] See also *McAfoos* v. *Canadian Pacific Steamships, Ltd.*, 243 F. 2d 270, 274 (2 Cir.), cert. denied, 355 U. S. 823 (1957); *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 451 (2 Cir.) (concurring opinion), cert. denied, 359 U. S. 1000 (1959). In any event, despite a dubious "archeological" argument, see *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354, 370 (1959), that might have been made from other language in the Act [fol. 117] 1789, an argument which, as a matter of possible interest to historians, we state and refute in the margin,[5]

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[4] Some of the cases suggest that to entitle a diversity plaintiff to a jury trial of a maritime claim joined with a claim at law, the maritime claim alone must satisfy the jurisdictional amount, see *Morrow* v. *Point Towing Co.*, 187 F. Supp. at 169. Normally aggregation for this purpose of claims properly joined is allowed, see 3 Moore, Federal Practice (2d ed. 1948), p. 1815 and cases cited note 5, also 1961 supplement pp. 160-161 and cases cited note 5.

[5] It may also be said with much force that statements by the Supreme Court that where diversity exists, a plaintiff may have an action "at law" in the Federal courts to enforce a maritime claim, see *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 188; *Steamboat Company* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873); *Norton* v. *Switzer*, 93 U. S. at 356; and *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 362 (1959); implicitly included that characteristic feature of an action at law, namely, a jury trial, even though no specific reference to that was made. See also *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959).

[6] Section 9 of the First Judiciary Act, which gave the district courts, *inter alia*, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," subject to the saving clause, provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Since the admiralty and maritime jurisdiction of the district courts under §9 extended only to "traditional" admiralty causes, such as proceedings *in rem* and suits *in personam* where the complaining party chose to call himself a

However, recognition of this rule does not call for reversal here. When the issue of jury trial arose, the judge had nothing before him save the pleadings. The complaint, [fol. 119] on which the jury demand was endorsed, gave no the point has now been placed beyond all doubt by lan [fol. 118] guage in a recent Supreme Court decision, *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, —— U. S. —— (1962).

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libelant rather than a plaintiff. *Leon* v. *Galceran*, 78 U. S. (11 Wall.) at 188; Mr. Justice Brennan dissenting in *Romero* v. *International Terminal Operating Co.*, 358 U. S. at 396, the last quoted provision in §9 would not itself weigh against the view that jury trial could be had in a suit on the "law side" where diversity existed. However, §12 of the Act of 1789 provided that in the circuit courts, in which diversity jurisdiction had been lodged, "the trial of issues in fact * * * shall, on all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury," and §19 made it "the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a statement of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court." Since the only suits of admiralty and maritime jurisdiction that could be brought on for initial trial in the circuit courts seem to have been those under the saving clause, notably cases of diverse citizenship, either originally, §11, or on removal, §12, it could be argued that the language of §12 excluding jury trial of issues of fact in admiralty and maritime matters, and of §19 requiring the court to find the facts in such cases, would have had no purpose unless it covered suits under the saving clause where the source of the right lay in general maritime law.

The answer, perhaps not a wholly satisfactory one, is that the language of §§12 and 19 of the Act of 1789 as to admiralty and maritime matters related rather to appeals to the circuit courts "from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars," authorized by §21, wherein, in accordance with traditional admiralty practice, evidence could be taken, see, e.g., *Yeaton* v. *United States*, 9 U. S. (5 Cranch) 281 (1809); *The Lucille*, 86 U. S. (19 Wall.) 73 (1874); *The Charles Morgan*, 115 U. S. 69 (1885); *Irvine* v. *The Hesper*, 122 U. S. 256 (1887). This view gains some support from §1 of the Act of February 16, 1875, 18 Stat. 315, which provided "That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall

indication of reliance on diversity; the pleader was so little concerned with that subject that he made no allegation of plaintiff's citizenship and alleged that defendant both was and wasn't a citizen of New York, although with an office there. No one called the judge's attention to the answer's disclaimer of defendant's New York citizenship—along with an admission of a New York office, which under the law

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find the facts and the conclusions of law upon which it renders its judgment or decrees, and shall state the facts and conclusions of law separately"—substantially as stated in §19 of the Act of 1789—and then went on "And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue * * * impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law." See *The Abbotsford*, 98 U. S. 440 (1879). Benedict, American Admiralty (3d ed. 1900), p. 104, says that this statute was intended to deal with appeals to the circuit court but that the author had never heard of a case where a jury had been used. See also notes to 28 U. S. C. §771 (1940 ed.) and *Munson SS. Line* v. *Miramar SS. Co.*, 167 F. 960 (2 Cir.), cert. denied, 214 U. S. 526 (1909).

In addition to this explanation, it seems most unlikely that, with the enthusiasm of the founders for jury trial and their adoption of Coke's "enmity" of admiralty jurisdiction (see Buller, *J.*, in *Smart* v. *Wolff*, 3 T. R. 323, 348, 100 Eng. Regp. 600, 613 (1789); 1 Holdsworth, History of English Law (3 ed. 1922), pp. 556-557; the resolution of the Massachusetts legislature quoted in 1 Holdsworth at p. 558 fn. 2; and the concurring opinion of Mr. Justice Johnson in *Ramsay* v. *Allegre*, 25 U. S. (12 Wheat.) 611, 614 (1827)), the framers of the First Judiciary Act could have meant to permit an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to prevent, by removal to the circuit court, a jury trial the plaintiff could otherwise have had, or to deprive the in-state defendant sued by the out-state plaintiff in the circuit court of such a trial.

The provisions of the First Judiciary Act here discussed remained in the statute book, save as modified by 5 Stat. 726 (1845), now 28 U. S. C. §1873, with respect to shipping upon the Great Lakes, until 1948, see Rev. Stat. §§566 and 648; Act of March 3, 1875, §3, Stat. 471; Judicial Code of 1911, §291, 36 Stat. 1167; 28 U. S. C. §770 (1940 ed.). The repeal was on the explicit ground that the subject was "covered by rule 38 of the Federal Rules of Civil Procedure," see Reviser's Note to 28 U. S. C. §1873.

applicable to suits brought after July 25, 1958, might well have negated diversity if plaintiff were a New York citizen. 28 U. S. C. 1332(c). Neither the judge nor, so far as we can see, anyone else then had any idea that Federal jurisdiction was being invoked on any basis other than the Jones Act, or that jury trial of the claim for maintenance and cure was being claimed on any basis other than "pendency" to it —"pendency" was the point of the authorities cited. Counsel's single reference to a "common-law basis" was quite insufficient to apprise the judge of a theory of diversity nowhere disclosed.

Later, in the course of testifying on the merits, San Martin said he had been born in Spain in 1897, had come to the United States in 1915, had joined the American Reporter in New York in 1953, and had lived in New York since his discharge from the Public Health Hospital in 1955. This, appellant says, shows that San Martin was a citizen either of Spain or of New York, so that diversity in fact existed. This was enough so that if the judge had altered his prior ruling and sent the maintenance and cure claim to the jury, we would affirm, since submission to the jury would have been proper on the facts as they later appeared, and we would conform the pleading to the proof. *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 234 F. 2d 253, 257-258 (2 Cir. 1956); see *Brooks* v. *Yawkey*, 200 F. 2d 663, 664 (1 Cir. 1953). However, counsel did not suggest [fol. 120] to the judge that San Martin's statements, made in the course of testifying generally, called for reconsideration of his earlier rulings as to jury trial. We cannot properly direct a busy District Court to retry San Martin's claim for maintenance and cure before a jury, after a fair trial before a judge, on a ground for jury trial not disclosed in the complaint and never brought to the judge's attention after it appeared.

## IV.

We thus come to appellant's alternative contention that, even if diversity was not sufficiently made out to render the denial of a jury trial of the claim for maintenance and cure erroneous on that score, San Martin was entitled to such a

trial of that claim on the basis of "pendent jurisdiction." In contrast to the argument based on diversity, this contention was raised below with sufficient clarity to require us to consider a question the Supreme Court left open in *Romero*, 358 U. S. at 381, namely, whether in a non-diversity case where a substantial claim has been asserted under the Jones Act, the District Court may and, if so, ought submit to the jury for final determination a claim for maintenance and cure which has been joined with it. On this we are divided. Chief Judge Lumbard, Judges Moore and Kaufman and I, for whom the balance of this opinion speaks, answer the first half of the question in the negative and do not reach the second; Judges Waterman and Smith, concurring for affirmance, differ with us in holding that in such a case the judge has discretion so to submit to the jury a claim for maintenance and cure arising out of the same event as the Jones Act claim; Judges Clark, Hays and Marshall believe jury trial of the joined claim for maintenance and cure was here required.

[fol. 121] (1) By explicit statutory direction an action under the Jones Act is "an action for damages at law with the right of trial by jury," 46 U. S. C. §688. As "an action * * * at law," it is governed by the Federal Rules of Civil Procedure, F. R. Civ. Proc. 1, despite the inapplicability of those rules "to proceedings in admiralty," F. R. Civ. Proc. 81(a)(1). A claim for maintenance and cure may properly be joined in such an action under the broad language of F. R. Civ. Proc. 18(a). We say this even though the claim is founded on the maritime law and the rule refers to the joinder of "claims either legal or equitable or both," words which we read as inserted, *ex majore cautela*, to prevent future judicial adherence to traditional distinctions against the joinder of legal and equitable claims, not to prohibit the joinder of claims under maritime law which the courts already permitted.[7]

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[7] See *Stevens* v. *R. O'Brien & Co.*, 62 F. 2d 632, 633 (1 Cir. 1933). Such joinder continued to be upheld in the First Circuit after adoption of the Federal Rules, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 517 (1940); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (1946), both antedating the First Circuit's position, *Jansson* v. *Swedish American Line*, 185

The mode of trial in actions governed by the Rules is dealt with clearly and comprehensively in F. R. Civ. Proc. 38 and 39. These rules set up a basic division between issues as to which the right of jury trial is "declared by the Seventh Amendment * * * or * * * given by a statute [fol. 122] of the United States," and others. As to the former the right "shall be preserved to the parties inviolate." F. R. Civ. Proc. 38(a), subject only to timely demand. F. R. Civ. Proc. 38(b); even when timely demand has not been made, the court may in its discretion "upon motion" order a jury trial of such issues. F. R. Civ. Proc. 39(b). However, under the plain language of the Rules, that is the limit of the court's freedom. If the issue is not one triable to a jury as of right, the court is limited to an advisory jury, unless both parties consent to "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." F. R. Civ. Proc. 39(c). This meshes with the direction in Rule 52(a) that in non-jury matters "the court shall find the facts specially and state separately its conclusions of law thereon," a meshing made all the plainer by the 1946 amendment explicitly making Rule 52(a) applicable when there has been an advisory jury. When a complaint joins claims differing in character, each is to be given the mode of trial appropriate to its nature. *Dairy Queen, Inc.* v. *Wood*, — U. S. — (1962); *Ring* v. *Spina*, 166 F. 2d 546, 550 (2 Cir.), cert. denied, 335 U. S. 813 (1948); *Orenstein* v. *United States*, 191 F. 2d 184 (1 Cir. 1951); *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir. 1952); *Schaefer* v. *Gunzburg*, 246 F. 2d 11 (9 Cir.), cert. denied.

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F. 2d 212, 217-218 (1950) and *Doucette* v. *Vincent*, 194 F. 2d 834, 836 (1952), with respect to the effect of 28 U. S. C. §1331 overruled in the *Romero* case. Footnote 5 to Chief Judge Magruder's opinion in the *Doucette* case states that diversity was not alleged in any of these three cases and that in *Nolan* the claim for maintenance and cure was for less than $3,000. 194 F. 2d at 840 fn. 5.

Joinder has also been upheld in the Third Circuit, *Lindquist* v. *Dilkes*, 187 F. 2d 21, 25 (1942), and in the Seventh, *Mallen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 172 F. 2d 601, 604 (1948). In this Circuit claims for maintenance and cure have long been joined with Jones Act claims, apparently as here without objection, even when there was no diversity.

355 U. S. 831 (1957); *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F. 2d 77 (1 Cir. 1957), although a prior jury verdict on a "legal" issue may conclusively determine an "equitable" one, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959).

The sharp distinction made between the court's discretion to order an ordinary jury trial on an issue where this might have been but was not demanded, Rule 39(b), and the limitations imposed upon the court, Rule 39(c), with respect [fol. 123] to issues "not triable of right," forbids a construction permitting a judge to order "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right" on an issue where no right to such a trial exists, merely because he might deem this convenient. Nothing to the contrary is indicated by decisions that an appellate court will not always reverse because of erroneous grant of a jury trial, *Hurwitz* v. *Hurwitz*, 136 F. 2d 796, 799 (D. C. Cir. 1943); cf. *Cargill, Incorporated* v. *Commodity Credit Corporation*, 275 F. 2d 745 (2 Cir. 1960), as it would be obliged to do for erroneous denial of one; the question is how to obey the Rules, not the consequence of disobeying them. We must confess that we can now see no sufficient reason why the Rules should be so rigidly drawn; we should think it desirable for a judge to have discretion to send to "a jury whose verdict has the same effect as if trial by jury had been a matter of right" all or part of equitable or maritime claims closely related to other claims on which jury trial is being had as of right, without as well as with "the consent of both parties,"* and would hope that

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* Perhaps the Committee justifiably thought it had done pretty well in accomplishing the merger of law and equity and did not wish to risk further ire from the proponents of equity by what might then have seemed a rather drastic proposal to give the judge discretion to order ordinary jury trial of an equitable claim.

* For example, a judge confronted with a maintenance and cure claim in a case such as this might like to have the jury determine, finally, rather than on a merely advisory basis, whether plaintiff's ailment arose while in the service of the ship, since the jury would have to consider this on the personal injury claim, but reserve for himself the purely medical issue, when maximum cure was effected if the verdict entitled the plaintiff to some award.

those now engaged in revising the Rules would consider such a change. However, the language of the Rules is too clear for any such reading, and we are therefore obliged to reject the unexplained *per curiam* dictum of a divided court *in banc*, *Reardon* v. *California Tanker Company*, 260 F. 2d [fol. 124] 369, 376 (2 Cir. 1958), cert. denied, 359 U. S. 926 (1959), that the mode of trial of a claim for maintenance, cure and wages joined with a claim for personal injury under the Jones Act rests in the discretion of the trial court, and address ourselves to the issue whether San Martin was given the right to jury trial of that claim "by the Seventh Amendment to the Constitution or * * * a statute of the United States." F. R. Civ. Proc. 38(a).

(2) Appellant does not contend that jury trial of a claim for maintenance and cure is "declared by the Seventh Amendment." The guarantee of jury trial in that amendment is limited to "suits at common law," the "common law" being, in Mr. Justice Story's words, "the common law of England, the grand reservoir of all our jurisprudence." *United States* v. *Wonson*, 28 Fed. Cas. 745, 750 (C. C. D. Mass. 1812). The amendment is "limited to rights and remedies peculiarly legal in their nature." *Shields* v. *Thomas*, 59 U. S. (18 How.) 253, 262 (1856); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48 (1937). "By common law, they [the framers] meant what the constitution denominated in the third article 'law': not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and maritime law and equity, was often found in the same suit." *Parsons* v. *Bedford*, 28 U. S. (3 Peters) 433, 446-447 (1830). Since longshoremen's claims "are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection * * * as to the right of trial by jury under the Seventh Amendment is unavailing." *Crowell* v. *Benson*, 285 U. S. 22, 45 (1932); the same must be true as to seamen's [fol. 125] "Even in saving clause cases * * * where the

plaintiff seeks a remedy which the common law is competent to give, there is not a *constitutional* right to jury trial; Congress could repeal the saving clause and make the federal admiralty remedy exclusive, with the clear result that there would be no right to jury trial in maritime cases." Currie, *supra*, at 5.

(3) In the light of the *Romero* decision, ruling out 28 U. S. C. §1331 as a statute of the United States which might afford a right of jury trial on a claim for maintenance and cure, the only statutes of the United States requiring consideration are the Jones Act and the saving clause.

(a) The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *" We held in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2 Cir.), cert. denied 359 U. S. 1000 (1959), that when a seaman suing for personal injury under the Jones Act predicated his action both on unseaworthiness and on negligence, both claims must be submitted to the jury. Judge Medina, writing for Judge Clark and himself, based this decision, 263 F. 2d 446, on "the fundamental singleness of the underlying claim, the fact that the Jones Act claim and the maritime claim of unseaworthiness," both claims in tort, generally predicated on the same facts and carrying the same measure of damages, "are so intertwined factually that they cannot as a matter of practice be separated into pieces." In that sense and in that only the unseaworthiness claim was described as "pendent," 263 F. 2d at 447. Judge Lumbard, [fol. 126] concurring, proposed a further ground, 263 F. 2d at 449-453, namely, "that the Jones Act, in permitting an action 'at law' for 'damages' for 'personal injury' to seamen, permitted them such an action based on the maritime doctrine of unseaworthiness as well as the legislative maritime doctrine of negligent operation." In a sense the result in the *Bartholomew* case followed rather inevitably from

the Supreme Court's decision in *Baltimore SS. Co.* v. *Philips*, 274 U. S. 316 (1927), that a judgment on a claim for personal injury based on unseaworthiness will bar assertion of a claim for the same injury based on negligence, and from *Pate* v. *Standard Dredging Co.*, 193 F. 2d 498, 502 (5 Cir. 1952), relied on by Judge Medina, 263 F. 2d 446 fn. 12, holding that a claim of unseaworthiness was not a "separate and independent claim or cause of action," so as to permit removal of a Jones Act claim under 28 U. S. C. 1441(c). Since the claim for maintenance and cure in the *Bartholomew* case had been tried to a judge in accordance with what had become the established practice in this circuit, nothing in the opinion was addressed to the mode of trial of such a claim.

It has long been recognized that the relationship of a claim for maintenance and cure to one for personal injury under the Jones Act is wholly different from the allegation of unseaworthiness in addition to negligence as a basis for the personal injury claim. The distinction was sharply drawn in *Pacific SS. Co.* v. *Peterson*, 278 U. S. 130 (1928), by the same bench that had decided the *Phillips* case eighteen months before. Receipt of maintenance and cure, the Court held, did not bar a subsequent action for personal injury under the Jones Act as a judgment in respect of unseaworthiness would. Mr. Justice Sanford disavowed, 278 U. S. 136, a previous expression of his in *Engel* v. *Davenport*, 217 U. S. 33, 36 (1926), which might be taken [fol. 127] "to mean that the right to recover compensatory damages under the new rule was granted as an alternative to the allowances covered by the old rules, including maintenance, cure and wages * * * *" The right given by the Jones Act "is not an alternative of the right under the old rule to 'maintenance, cure and wages'—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in The Montezuma (C. C. A.), 19 F. 2d 355, 356, the 'personal indenture created by the relation of the seaman to his vessel,'" a right "implied in law as a contractual obligation arising out of the nature of the employment" and "independent of the right to indemnity or

compensatory damage for an injury caused by negligence," 278 U. S. 137-138.

It is not unnatural that, with this guidance, most Courts of Appeals took a radically different approach to the status of a claim for maintenance, cure and wages vis-a-vis a claim for personal injury under the Jones Act with which it had been joined, than with respect to the assertion of unseaworthiness in addition to negligence as a basis for recovery. The *Pate* decision, *supra*, assumed, 193 F. 2d 502, that a claim for maintenance and cure constituted a "separate and independent claim" under 28 U. S. C. §1441(c), which would have warranted removal in a case of diverse citizenship if jurisdictional amount existed. Somewhat earlier, dealing with the very question here presented, Judge Maris had written, for a unanimous court *in banc*, that it was error to send to a jury a claim for maintenance and cure joined with a claim for personal injury under the Jones Act, *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950), a decision shortly followed in *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82, 85-86 (7 Cir.), cert. denied, 342 U. S. 888 (1951). The [fol. 128] leading text thus correctly states, "By unquestionable authority a maintenance and cure claim is 'separate and independent' from both a Jones Act claim or an unseaworthiness claim for purposes of *res judicata* or §1441(c) or anything else." Gilmore and Black, Admiralty, p. 341. And we ourselves have recently said, in *Ryan* v. *United States Lines Company*, —— F. 2d ——, —— (2 Cir. 1962), that the claims are "totally different."

The differences exist both in the legal nature of the claims and in the practicalities of trial. The personal injury claim sounds in tort; the claim for maintenance, cure and wages "has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident," *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932); see *Vaughan* v. *Atkinson*, —— U. S. —— (1962). The amount sought is likewise different; that involved in the claim for maintenance, cure and wages is usually a small fraction of that sued for in the personal injury claim. Even though the

incident contended to give rise to the personal injury claim is found never to have occurred, the seaman will still be entitled to maintenance, cure and wages if his condition arose in the service of the ship. The litigated points on the latter claim are simply whether the condition arose in the seaman's service and when maximum cure has been effected; this is usually a contest of medical experts, on issues the former of which may have little and the latter has no relation to the personal injury claim.

However, the practice in this Circuit until 1956 seems to have been to submit a claim for maintenance and cure to the jury along with a claim under the Jones Act, even though no diversity existed. The legal basis for this and the contrary authorities in other circuits were not discussed, although the practice was noted, without disapproval, in *McAllister* v. *Cosmopolitan Shipping Co.*, 169 F. [fol. 129] 2d 4 (1948), rev'd on other grounds, 337 U. S. 783 (1949); *Gonzales* v. *United Fruit Co.*, 193 F. 2d 479 (1951); and *Rosenquist* v. *Isthmian SS. Co.*, 205 F. 2d 486 (1953). *Weiss* v. *Central R. Co.*, 235 F. 2d 309 (1956), was the turning point. This Court's opinion, by Judge Clark, mentioned in a footnote that the judge had decided the maintenance and cure count, at the plaintiff's request and, apparently, without objection by the defendant—"Hence there is not involved the practice followed in this circuit of submitting the issue of maintenance and cure to the jury, along with the issue of negligence," citing the *Gonzales* case, *supra*. The footnote added "Obviously the simultaneous trial of the two claims—one to the judge sitting in admiralty and the other to the jury—is convenient and proper." This considered statement and its approving citation of *Jordine* v. *Walling* and *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, *supra*, caused the district courts in this circuit generally to alter their practice so that, although unseaworthiness claims joined in Jones Act suits have regularly been submitted to the jury even though there be no diversity, claims for maintenance and cure in non-diversity cases have been reserved for trial by the judge. See, e.g., *Troupe* v. *Chicago, D. & G. B. Transit Co.*, 234 F. 2d 253, 256 (1956); *Bartholomew* v. *Universe Tank-*

*ships, Inc., supra*, cert. denied, 359 U. S. 1000 (1959); *Murray* v. *New York Central R. Co.*, 287 F. 2d 152, 153, cert. denied, 366 U. S. 945 (1961); *Salem* v. *United States Lines Co.*, 293 F. 2d 121, 124, rev'd on other grounds, —— U. S. —— (1962). Since the district judges were following the lead we had given them in *Weiss*, we naturally approved; and the later dictum as to discretion, in *Reardon*, appears to have had little or no practical effect.

(b) It is now urged that even though the claim for maintenance, cure and wages be not "pendent" to the personal [fol. 130] injury claim in the limited sense defined in *Bartholomew*, it is "pendent" in a more general sense which entitled the plaintiff to a jury trial under the "saving clause."[10] The Supreme Court pointed out in *Romero*, 358 U. S. 380-381, the anomaly of applying the "pendent jurisdiction" doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933)—that the assertion of a Federal claim permits a Federal court to decide a sufficiently related non-Federal claim otherwise outside its jurisdiction—to a claim for maintenance and cure which is always within Federal jurisdiction under 28 U. S. C. §1333(1), as, indeed, both Judge Medina and Judge Lumbard had done a few weeks earlier in *Bartholomew*, 263 F. 2d at 449, 455. Moreover, *Hurn* v. *Oursler* relates to the jurisdiction of a Federal court to decide a claim—not to the mode of trial; no one has ever supposed that joinder of a "state" equitable claim with a related "federal" legal claim under *Hurn* v. *Oursler* entitled the former to a jury trial. We see no reason for a different result when the joined claim is a Federal claim arising under the general maritime law.

We likewise see no force in an argument that if the door to the "law side" of the Federal court is unlocked by a claim under 28 U. S. C. §1331, here the Jones Act, the "saving clause" takes over and gives a right to jury trial on any claim for a money judgment properly joined, despite its

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[10] The change in language in the saving clause by the Judicial Code revision of 1948 is without significance—the Reviser's Note stating that the "substituted language" had been used as "simpler and more expressive of the original intent of Congress * * *" See Gilmore and Black, Admiralty (1956), 35.

maritime nature, just as if the door had been unlocked by diversity. 1332.] This overlooks what the saving clause was to save. The framers of the First Judiciary Act were [fol. 131] concerned with the many maritime claims for money judgments, which during the Revolution and under the Articles of Confederation had generally been tried in courts of the colonies or the states,[11] conveniently located to the suitors, and with jury trial. The prime purpose of the saving clause was to insure that such suits could continue to be brought and tried where and as they had been. *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390 (1848); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 362. However, the grant of diversity jurisdiction allowed an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to remove such a suit to the circuit court, and a plaintiff of diverse citizenship to bring it there. In order to prevent this from altering the mode of trial, as well as to preserve for the diversity plaintiff suing in the circuit court the same mode of trial he would have had in the state court, there was developed the rule, noted in section III of this opinion, that when a maritime claim for a money judgment is heard in a Federal court because of diversity, the saving clause entitles the parties to the same jury trial they would normally have had in the state court. It was stated from an early date that the common law remedy preserved by the saving clause existed in the Federal courts only in diversity cases. *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185, 188 (1871); *Steamboat Co.* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873), to which, broadly speaking, the circuit courts were limited until 1875, 18 Stat. 470.

[fol. 132] The saving clause considerations thus calling for a jury trial of a maritime claim in a diversity case are in no way pertinent to a non-diversity maritime claim joinable but not unitary with a statutory claim to which Con-

[11] Although some colonies and states created admiralty courts after 1776, the jurisdiction of most of these was limited to prize cases. See Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 Corn. L. Q. 460 (1925).

gress has accorded jury trial. Existence of a related Federal statutory claim does not expose the plaintiff suing in a state court under the saving clause to a risk of removal, as diversity does; he may protect himself, by limiting his state court action to his non-statutory claim.[12] Moreover, in the Jones Act, Congress specifically provided that the new statutory claim should not itself be removable, 28 U. S. C. §1445(a); hence even the joinder of such a claim with one for maintenance and cure does not give the defendant any right to remove the latter that he would not otherwise have had. Neither does the new statutory claim afford a non-diversity plaintiff a new opportunity to deprive the defendant of jury trial of the non-statutory claim by suing in the Federal court under §1331—the plaintiff could always have had non-jury trial of the maritime claim by suing in admiralty under §1333. Finally, whereas jury trial is needed to give the diversity plaintiff the same right in the Federal that he would have had in the state court, there is no similar basis for Federal solicitude with respect to the non-diverse plaintiff. Hence there is no reason why a claim for maintenance and cure should stand any differently with respect to jury trial in a Federal court after the Jones Act than before, unless the very existence of the new statutory claim demands this. A unanimous Supreme Court in 1928, far closer to the Jones Act than we, unmistakably considered [fol. 133] that the Act had left maintenance and cure exactly as this had always been, *Pacific SS. Co.* v. *Peterson*, *supra*; we would see no reason for a different view even if we had the power to take one. We conclude that since neither the Jones Act nor the saving clause gave plaintiff a right to jury trial of his claim for maintenance and cure, it would have been error, under Rules 38 and 39, to grant him one, save on an advisory basis.

The judgment is affirmed.

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[12] Although 28 U. S. C. §1441 permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," the saving clause forbids a literal reading that would include actions of which a district court would have jurisdiction solely because of 28 U. S. C. §1333. *Hill* v. *United Fruit Co.*, 149 F. Supp. 470 (S. D. Cal. 1957).

CLARK, *Circuit Judge*, whom Judges HAYS and MARSHALL join, dissenting:

Commentators have had occasion to refer to the Jones Act, 46 U. S. C. 688, passed in 1920, as an example of "impossibly bad drafting." Gilmore & Black, The Law of Admiralty 282 (1957). But since 1940 "the Supreme Court has been rewriting the law" and the "rewrite job has gone far enough to make it clear that a revolution has taken place." *Ibid.* 248. In this process, recovery for personal injuries for unseaworthiness has practically swallowed Jones Act negligence, which remains only as a convenient tag upon which to ground jurisdiction "at law" and trial by jury as granted in the statute. It is now clear that claims based on unseaworthiness and on maintenance and cure may be joined with claims for negligence, and that there is a right of trial by jury on the unseaworthiness claim so joined. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 263 F. 2d 437, certiorari denied 359 U. S. 1000; and see *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 380-381. Left undecided is the question here at issue, namely whether there is a right to jury trial on the claim for maintenance and cure when joined with a claim for Jones Act negligence.

[fol. 134] That this is a serious and troublesome issue is shown by the three different opinions held by us on this appeal. Differences are perhaps natural in view of the clash of policy between safeguarding a cherished admiralty right, long antedating the Jones Act, on the one hand, and the clarity and convenience of the unitary approach now being achieved under that Act on the other. The rationale of that approach seems such as to include all three of the claims we are considering in situations such as here disclosed, and we have concluded that they should be treated alike so far as the form of trial is concerned.

Before analyzing this more carefully we should note that a claim for maintenance and cure may be asserted on quite other facts than those of the accident giving rise to the claims for damages for personal injuries, and the claim may therefore be one remediable only in admiralty. What we are dealing with are overlapping claims arising out of a single accident—the situation here, as expressly alleged

in the complaint. Many of the cases cited by my brother Friendly to show the separate nature of the maintenance-and-cure claim are those where there were not overlapping claims or where the defendant did not show that an award so made involved double recovery, while others were those where the parties failed to object to a court trial. It seems that only lately has this problem of duplicating recoveries assumed the importance it deserves. But once perceived, there is no question about the answer and the need to avoid such duplication of recovery. Thus in the second *Bartholomew* case we remanded specifically for the deduction of such overlapping recoveries, holding the burden on the defendant to show the amount thereof. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 279 F. 2d 911, 916-917, citing cases such as *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Smith* v. [fol. 135] *Lykes Bros.-Ripley S.S. Co.*, 5 Cir., 105 F. 2d 604, certiorari denied *Lykes Bros. Ripley S.S. Co.* v. *Smith*, 308 U. S. 604; and *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, certiorari denied 359 U. S. 926. See also Gilmore & Black, The Law of Admiralty 261 (1957). The inconvenience and often error of this duplicating form of trial points to the need for a rule of law preserving the unitary approach to include a claim for maintenance and cure, as well as of negligence and unseaworthiness, all arising out of the same accident. Further, the doctrine of collateral estoppel will bar relitigation of issues and facts settled in earlier litigation and may thus operate in particular instances even to cut down the jury trial now so thoroughly supported under the *Bartholomew* principle. See *McCarthy* v. *American Eastern Corp.*, *supra*, 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Runyan* v. *Great Lakes Dredge & Dock Co.*, 6 Cir., 141 F. 2d 396; *La Fontaine* v. *The G. M. McAllister*, D. C. S. D. N. Y., 101 F. Supp. 826.

In the light of these well settled principles it would seem that careful analysis supports the teaching of practical convenience and necessity to the effect that the single claim or cause should be considered at the one trial. As Judge Friendly shows, a presently popular rationale treats the additional admiralty claims as "pendent" to the Jones Act

claim "at law" for negligence. See *Bartholomew* v. *Universe Tankships, Inc., supra*, 2 Cir., 263 F. 2d 437, 448, certiorari denied 359 U. S. 1000; *Romero* v. *International Terminal Operating Co., supra*, 358 U. S. 354, 380-381; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 331. Another approach is that of Judge Lumbard in the first *Bartholomew* case, 2 Cir., 263 F. 2d 437, 448, that the Jones Act itself should be construed as broad enough to include all these claims in its aegis. These are but differing ways of stating the same result, which goes back to "the funda- [fol. 136] mental singleness of the underlying claim" where "the legal theories differ somewhat," but "from the standpoint of the parties the facts all exist as a single unit." Medina, *J.*, in 2 Cir., 263 F. 2d 437, 446, 447. To the writer clarity and convenience in thinking are promoted by viewing the situation in terms of the single cause of action, the identic factual situation which may give rise to several rights of action or legal remedies. "On any realistic appraisal there should be only one cause of action for jurisdiction and hence for trial. When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with a right of jury trial on *all* the issues." 5 Moore's Federal Practice 284 (2d Ed. 1951).

This points the way to a logical as well as convenient solution. When the claim for maintenance and cure is based on a cause of action unconnected with that upon which the claims of negligence and unseaworthiness are founded, then the claim must be pursued in admiralty and there is no right to a jury trial. When, however, all the claims are based on the same cause of action, then they must be tried as a unit and the right of jury trial accorded by the Jones Act applies to all the contentions. That is the situation here under the issues tendered by the complaint; and since the plaintiff pressed his claim for jury trial, the court was in error in reserving trial to itself.[1]

[1] Seemingly the scholarly commentators support the unitary approach and trial by jury as the preferred course. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27

[fol. 137] The approach we have made accords with the authorities we have cited and is not precluded by any specific precedent, so far as we are advised. True, there is much by way of dicta or lack of discussion or even overlooking of the point, all of which adds to the confusion. Actual decision is scanty to the point of nonexistence. This fact, plus undoubted dicta (in which the writer also has participated), does lend support to the approach of our brothers WATERMAN and SMITH, suggesting that we might still continue to rely upon our past statements, holding maintenance and cure a remedy always available also in admiralty, until the Supreme Court tells us otherwise. But notwithstanding our sympathy for this view, we are constrained to conclude that we must go where reason and practical necessity take us, namely to the unitary form of approach and the resulting trial by jury as we have outlined.

There remains the third approach to this issue, that set forth by Judge FRIENDLY speaking for himself and three other members of the court. We are constrained to hold this the least satisfactory of the three on policy, precedent, and logical analysis. First it is held that, while normally a jury trial may be had of maintenance and cure when jurisdiction is based on diversity of citizenship, such claim was here lost or waived by inadequate pleading or disclosure to the court. This, we suggest, is cavalier treatment of perhaps the most cherished of all procedural rights and is not justified on the record before us.[2] No precedent is

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U. Chi. L. Rev. 1, 4-6, 41-51, 58-65, esp. 63-64 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 849, 850 (1960); 73 Harv. L. Rev. 138, 142-146 (1959); 5 Moore's Federal Practice 284 (2d Ed. 1951); Gilmore & Black, The Law of Admiralty 262 (1957).

[2] This is based in substance upon the failure of the complaint to set forth the plaintiff's citizenship, jurisdiction being there based on the Jones Act. But under modern civil procedure, the jury trial right comes from the Constitution, not the trial court, and such trial being once claimed (as here in the plaintiff's complaint) cannot be lost unless it is waived by written stipulation or oral stipulation made in open court. F. R. 38(b)-(d), 39(a); James, *Trial by Jury and the New Federal Rules of Procedure*, 45 Yale L. J. 1022 (1936); Clark, Code Pleading 113-122 (2d

[fol. 138] cited for this novel restriction on the jury trial right. Then it is held that all claims for maintenance and cure not brought in the court's diversity jurisdiction must invariably be tried to the court. This presents the unusual spectacle of a forced court trial and of course rejects the unitary approach by arbitrary fiat and not for policy or convenience in the large number of cases to which it is applicable.[2] The result is necessarily a rigid compartmen-

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Ed. 1947). There is no requirement that a party must plead in such a way as to warn the court of his constitutional right. Actually here the plaintiff's counsel in pressing his claim in successive colloquies at the opening of trial cut short by the judge's adverse rulings made broad contentions quite adequate to cover this issue. Thus he specifically cited jury trials of state actions at law for maintenance and cure. Indeed it is difficult to see how he could have put his claim more inclusively unless he could have foreseen the novel trend my brothers' opinion was later to take. Rather inconsistently they hold that the claim for jury trial of the issue as *pendent* to the main issue was sufficiently asserted to require disposition even though "pendent" was never mentioned in the colloquies. Further the court is bound to examine the entire record to see if San Martin's citizenship was there disclosed. *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 257-258, and amendment of the pleadings, even on appeal, is directed by 28 U. S. C. §1653. See *Brooks* v. *Yawkey*, 1 Cir., 200 F. 2d 663, 664.

[2] This appears to be a complete acceptance in this area of the law, and a rejection of our settled rule to the contrary, of the holding in *Jardine* v. *Walling*, 3 Cir., 185 F. 2d 662, that jury trial of the issue of maintenance and cure constitutes reversible error. This holding, which has been widely criticized by scholars—see the writers cited in note 1 *supra*, and notably Professors Moore and Currie—has not been followed in the First Circuit, where the practical need of jury trials has been ably set forth by Judge Wyzanski in the oft-cited case of *Jenkins* v. *Roderick*, D. C. Mass., 156 F. Supp. 299, 304-306, following *Doucette* v. *Vincent*, 1 Cir., 194 F. 2d 834, 840, 846. We have cited with approval Professor Moore's criticism, 5 Moore's Federal Practice 2814-2815 (2d Ed. 1951), *supra*, of the *Jardine* case as improperly dividing up a single cause of action, and have never found error in the submission of this issue to a jury. *Gonzales* v. *United Fruit Co.*, 2 Cir., 193 F. 2d 479, 480, n. 1; see also *Reinequist* v. *Isthmian S.S. Co.*, 2 Cir., 205 F. 2d 486, and *McAllister* v. *Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4, reversed on another issue, 337 U. S. 783. A dictum in a footnote in *Weiss* v. *Central R. Co. of N. J.*, 2 Cir., 235 F. 2d 309, 310, n. 1, has occasionally been mis-

[fol. 139] talized system where jury trial must be had in some of the cases, and court trial in others. Since this division is unconnected with the practicalities of the situation, since in this type of case it is easy to overlook the citizenship of the parties where the Jones Act is the primary source of federal jurisdiction, we must necessarily expect reversals based on form rather than substance.* We fear the unsatisfactory results which will ensue from this novel formalism in the general maritime law.

Our conclusion therefore is that the district court erred in depriving the plaintiff of his asserted right to a jury trial of his entire cause of action. The judgment should therefore be reversed and the action remanded for a trial to the jury.

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SMITH, *Circuit Judge*, concurring in the result:

Judge Waterman and I concur in the result reached by Judge Friendly and our three colleagues who have concurred in his opinion. We affirm, with them, the action of the court below. We agree that when a maintenance and cure claim arising out of the same event that gave rise to the Jones Act claim is coupled with the Jones Act claim and therefore tried on the "law side" of the court, and the

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read as expressing a preference for court trial of this issue, even though it cited and relied on the *Gonzales* case, and only ventured to suggest that the trial judge had also discretion to order a court trial. That suggestion we now believe should be withdrawn for the reasons stated in the text of this dissent.

*The stress placed on the supposed compulsion of F. R. 39(c) seems out of place, for the rules provide only a procedure for working out the substantive rules of trial elsewhere stated, as in the Constitution or statutes. If a trial judge does take a jury verdict when he is not required to do so, error cannot be assigned on his action. *Hurwitz* v. *Hurwitz*, D. C. Cir., 136 F. 2d 796, 799, 148 A. L. R. 226; *Rath* v. *Wilgus*, 110 Neb. 810, 195 N. W. 115; *Groome* v. *Steward*, D. C. Cir., 142 F. 2d 756; Clark, Code Pleading 90, 102, 106, 107 (2d Ed. 1947).

[fol. 140] parties are of diverse citizenship,[1] the maintenance and cure claim must be tried to a jury. We agree that, when the parties are not of diverse citizenship, even though the Jones Act claim is tried to a jury, it is proper to try the maintenance and cure claim to the judge alone.

We are also of the opinion, however, and in this respect we differ from our colleagues, that in this latter situation the trial judge may deem it advisable to submit the maintenance and cure claim to the jury along with the Jones Act claim, and if this is done we would not consider such a submission erroneous but well within a proper discretion so as to preserve a unitary case.

When in a non-diversity case a maintenance and cure claim is presented for adjudication with a Jones Act claim, but the maintenance and cure claim does not arise out of the same event as the Jones Act claim, we are of the opinion that the maintenance and cure claim should always be tried to the court alone, and never submitted to the jury, even if the Jones Act claim is jury-submitted.

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[1] By the phrase "diverse citizenship" we include all prerequisites for so-called "diversity jurisdiction" on the law side of a federal district court, not simply a pleading that the parties are residents of different states.

[fol. 141]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

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THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased, Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY, Defendant and Third Party Plaintiff-Appellee,

UNITED STATES OF AMERICA, Third Party Defendant.

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JUDGMENT—June 29, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the defendant-appellee.

A. Daniel Fusaro, Clerk, by Vincent A. Carlin, Chief Deputy Clerk.

[fol. 142]

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from Vol. I Pgs. 1a-90a; Vol. II Pgs. 91a to 142a, inclusive, contain a true and complete transcript of the printed portions of the record and proceedings had in said Court, in the case of

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased, Plaintiff-Appellant,

*against*

UNITED STATES LINES COMPANY, Defendant and Third Party Plaintiff-Appellee,

UNITED STATES OF AMERICA, Third Party Defendant.

as the same remain of record on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-fourth day of September, in the year of our Lord one thousand nine hundred and sixty-two, and of the Independence of the said United States the one hundred and eighty-seventh.

A. Daniel Fusaro, Clerk, by Vincent A. Carlin, Chief Deputy Clerk.

Clerk's Certificate (omitted in printing).

[fol. 143]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 10, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to the following question:

Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.